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818
No. 2267

United States
Circuit Court of Appeals

For the Ninth Circuit.

DANIEL E. MORRIS, LOUIS A. LLOYD and J.
A. MAGUIRE, as Trustees of the WARREN
IMPROVEMENT COMPANY, a Corpora-
tion, Claimant of the Tug "ADA WARREN,"
Her Tackle, Apparel and Furniture,
Appellants,

vs.

THE GLOBE NAVIGATION COMPANY, a
Corporation,
Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

FILED

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Court of appeals
8/9

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Statement of Clerk U. S. District Court.

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,602.

GLOBE NAVIGATION COMPANY, LIMITED,
a Corporation,

Libelant and Appellee,
vs.

Tug "ADA WARREN," Her Tackle, Apparel and
Furniture,

Respondent.

WARREN IMPROVEMENT COMPANY, a Cor-
poration,

Claimant and Appellant.

PARTIES.

Libelant: Globe Navigation Company, Limited, a
corporation.

Respondent: Tug "Ada Warren," her tackle, apparel
and furniture.

Claimant: Warren Improvement Company, a cor-
poration.

PROCTORS.

Libelant: Messrs. Smith and Pringle, William Den-
man, Esquire, San Francisco, Cal. [1*]

Respondent and Claimant: Messrs. Andros and
Hengstler, San Francisco, Cal.

1906.

October 17. Filed verified libel to recover \$17,-
200, with costs and interest in a
cause of collision, etc.

*Page-number appearing at foot of page of original certified Record.

Issued Monition for the attachment of the Tug "Ada Warren," her tackle, apparel and furniture, and which said Monition was afterwards on the 17th day of October, 1906, returned and filed, with the return of the United States Marshal for the Northern District of California, endorsed thereon as follows:

"In obedience to the within Monition, I attached the tug 'Ada Warren' therein described, on the 17th day of October, 1906, and have given due notice to all persons claiming the same that this Court will, on the 30th day of October, 1906, (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. By leaving a copy of the within Monition with A. D. Sweeney, Engineer in charge [2] of said tug 'Ada Warren.'

C. T. ELLIOTT,

United States Marshal.

By Paul J. Arnerich,

Deputy.

San Francisco, Cal., October 17, 1906."

October 17. Filed claim of Warren Improvement Company, a corporation, to the tug "Ada Warren," etc.

Filed stipulation of parties hereto, that the tug "Ada Warren" be released upon the executing of an Admiralty Stipulation in the sum of \$20,000.00.

Filed Admiralty Stipulation (bond) in the sum of \$20,000.00, with the National Surety Company of New York as surety for the release of said tug.

1907.

January 25. Received deposition of H. Johanson.

February 15. Received deposition of T. D. McFarland.

1908.

January 18. A hearing was this day had before Honorable J. J. De Haven, Judge of the District Court of the United States for the Northern District of California, and it was thereupon ordered that this cause be consolidated for hearing with the case of Warren Improvement Company, a corporation vs. American Steamship "Meteor," etc., No. 13,648.
[3]

February 13. This cause this day came on for hearing as heretofore ordered, before the Honorable J. J. DE HAVEN,

Judge of the District Court of the United States, for the Northern District of California. The deposition of T. D. McFarland was introduced on behalf of libelant. Claimant was allowed to amend its answer. The further hearing of this cause was then continued until February 20, 1908.

February 17. Filed Answer of Warren Improvement Company.

Filed Amendment to Answer of Warren Improvement Company.

February 20. The further hearing of this cause was this day resumed before the Honorable John J. De Haven, Judge as aforesaid, and the cause was argued and submitted to the Court for decision.

Filed testimony taken in open Court.

1909.

February 26. The Honorable J. J. De Haven, this day filed a written opinion, dismissing libel in the case of Warren Improvement Company vs. the American Steamship "Meteor," No. 13,648, and awarding damages to Libelant in the case of Globe Navigation Company vs. the "Ada Warren," etc., No. 13,602; further ordered that the cause of Globe Navigation Company vs. "Ada Warren," No. 13,602, be referred

to United States Commissioner,
[4] Jas. J. Brown, to ascertain
and report the amount of damages
sustained by the libelant in said
case.

February 26. Filed Opinion.
1910.

April 5. Received deposition of Frank
Walker, C. W. Wiley and G. F.
Thorndyke.

1911.

October 25. Filed deposition of George E. Page.
1912.

January 26. Filed report of Commissioner, Jas. P.
Brown, to whom this cause was
referred.

February 3. Filed Exceptions to Report of Com-
missioner Jas. P. Brown.

November 6. The Exceptions to the Report of the
United States Commissioner here-
tofore filed herein, this day came
on for hearing before the Honor-
able J. J. De Haven, Judge as
aforesaid. Mr. Denman intro-
duced certain evidence, etc., and
the cause was then continued to
November 11, 1912.

November 11. Further hearing of the Exceptions to
the Report of United States Com-
missioner Jas. P. Brown was this
day had before the said Honorable
J. J. De Haven, and were there-

upon submitted to the Court for
decision. [5]

1912.

December 2. Exceptions to the Report of Commissioner heretofore submitted to the Court were this day overruled and it was ordered by said Court that said Report of said Commissioner be confirmed.

December 3. Filed Final Decree.

1913.

January 8. Filed Notice of Appeal.

February 2. Filed Bonds on Appeal.

February 26. Filed Petition of D. E. Morris, L. A. Lloyd and J. A. Maguire, that they be made parties of said Appeal.

April 2. Filed Assignment of Errors. [6]

UNITED STATES OF AMERICA.

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 13,602.

GLOBE NAVIGATION COMPANY, a Corporation,
tion,

Libelant and Appellee,
vs.

Tug "ADA WARREN," Her Engines, etc.,
Respondent,

WARREN IMPROVEMENT CO., a Corporation,
Claimant and Appellant.

Praecipe [for Apostles on Appeal].

To the Clerk of said Court:

Sir: Libelant herein having appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the final Decree of this Court entered herein, you are hereby requested to prepare and certify the Apostles on Appeal, to be filed in said Appellate Court on or before the 7th day of April, 1913 (it having been stipulated by the parties hereto, and ordered by the Court, that appellant should have to and including said day within which time to procure to be filed in said Appellate Court the Apostles, certified by the Clerk of the District Court, as in Rule 12 of the "Rules in Admiralty," of said Appellate Court provided); said Apostles on Appeal to be prepared in accordance with Rule 4 of said "Rules in Admiralty," except that all exhibits introduced in evidence at the hearing before the above Court and before the Commissioner to whom [7] said cause was referred for the determination of libelant's damages, shall be filed in the Appellate Court in their original form, and to include in their proper order the following papers and documents, to wit:

1. All the matters prescribed and mentioned in Admiralty Rule No. 4, Section No. 1, of said Appellate Court.

2. Libel of Globe Navigation Company.

3. Answer to said Libel.

4. Amendment to said Answer.

5. All of the testimony adduced at the hearing before said District Court.

6. The deposition of T. D. McFarland.
7. Interlocutory Decree of said District Court.
8. Opinion of District Court.
9. Depositions of Frank Walker, C. W. Wiley, G. F. Thorndyke and George E. Page.
10. Report of Jas. P. Brown, Commissioner, on damages.
11. Exceptions to Report of Commissioner.
12. Order Overruling Exceptions to, and sustaining Commissioner's Report.
13. Orders extending time filed respectively: February 1, 1912, and February 5, 1912.
14. Final Decree.
15. Notice of Appeal.
16. Stipulations and Orders extending time filed respectively: January 18, 1913; January 28, 1913, and February 1, 1913.
17. Exhibits introduced in evidence at the hearing of said cause before the District Court (to be filed in their original forms), as follows:
 - a. Cardboard model of "Ada Warren" and Barge, marked Exhibit "A."
 - b. Cardboard model of "Meteor" marked Exhibit "B." [8]
 - c. Chart of San Pablo Bay, marked Exhibit "C."
 - d. Judgment of U. S. Local Inspectors, marked Exhibit "D."
18. Exhibits introduced in evidence before the Commissioner (to be filed in their original forms) as follows:
 - a. Statement of Particular Average and Protection Claims, Case of the Str. "Meteor," marked Exhibit "A."

b. Bill, "S. S. 'Meteor' and owners to Standard Boiler Works, Dr." marked Exhibit "B."

c. Bill "S. S. 'Meteor' and owners to Standard Boiler Works, Dr.," marked Exhibit "C."

d. Letter, Globe Navigation Co., Ltd., to Chas. R. McCormick & Co., marked Exhibit "D."

e. Telegram, J. H. Baxter to Globe Navigation Co., Ltd., marked Exhibit "E."

f. Letter, J. H. Baxter, to Globe Navigation Co., Ltd., marked Exhibit "1."

g. Five sheets headed "Globe Navigation Co., Ltd., Voyage Earnings and Expenses," marked Exhibit "2."

March 10, 1913.

ANDROS & HENGSTLER,

Proctors for Claimant and Appellant.

[Endorsed]: Filed Mar. 11, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [9]

*In the District Court of the United States, in and for
the Northern District of California.*

GLOBE NAVIGATION COMPANY, LIMITED,
a Corporation,

Libelant,

vs.

Tug "ADA WARREN," Her Tackle, Apparel and
Furniture.

Libel.

The libel of Globe Navigation Company, Limited, a corporation, against the tug "Ada Warren," her tackle, apparel and furniture, and all persons law-

fully intervening for their interests in the same, in a cause of collision, civil and maritime, alleges as follows:

I.

That your libelant, before and at the time of collision hereinafter mentioned, was the owner and proprietor of the steamship "Meteor," her engines, boilers, machinery, tackle, apparel and furniture, which said steamship was used by your libelant as a general carrier of merchandise.

II.

That on Thursday, the 11th day of October, 1906, the said steamship "Meteor," with her engines, boilers, fixtures, apparel and furniture, and at about the hour of 4:30 o'clock A. M. of said day, was proceeding down the Bay of San Francisco in a westerly direction from Port Costa to the city of San Francisco; that at said time said steamship "Meteor" was tight, staunch and strong, and in every respect well manned, tackled, appareled and appointed, and that the master and crew engaged on board said steamship were on the lookout for the protection and safety of said vessel.

III. [10]

That at said time on said day, and while said steamship was proceeding down said bay, the tug "Ada Warren," whereof John Doe Hammer was master, did then and there with great force and violence run into and upon said steamship "Meteor," and did thereby cause great damage and injury to the said steamship "Meteor" and her hull, and did remain foul of and upon said steamship "Meteor"

until she (the said tug “Ada Warren”) swayed around, when she cleared and passed on.

IV.

That while said steamship “Meteor” was proceeding on her course as aforesaid said tug “Ada Warren” appeared off the port bow of said steamship with a barge on a hawser; the course of said tug “Ada Warren” being at said time in a northeasterly direction, and that if said tug had continued on said course she and her tow would have safely passed the bows of said steamship “Meteor”; that at said time, when said tug “Ada Warren” was first seen by the captain of said steamship “Meteor” and from the bridge of said steamship, the green light of said tug “Ada Warren” was visible, and that the red light of said tug “Ada Warren” was not visible; that at said time your libelant believes and therefore alleges that the red light of said steamship “Meteor” was visible to those in command of said tug “Ada Warren,” and that the green light of said steamship “Meteor” was not visible to those in command of said tug “Ada Warren.”

That said vessels continued on their courses as aforesaid until within a distance of about — thousand feet, whereupon said tug “Ada Warren” turned to starboard so as to show both lights and proceeded directly against said steamship “Meteor” head on; that said tug “Ada Warren” ran into said steamship “Meteor” with great force and violence, cutting in the hull and doing great general damage to said steamship.

V.

That said tug “Ada Warren” was proceeding at

full speed, [11] and that but for the improper and unskilled management of the persons navigating said tug "Ada Warren" said collision would not have occurred; that if the persons navigating said tug "Ada Warren" had signified their intention in proper time of passing on the port side of said steamship "Meteor" said collision would not have occurred; but, on the contrary, said tug "Ada Warren" was so improperly and unskillfully managed and navigated in the particulars above mentioned that she was driven upon and into the said steamship "Meteor" as hereinabove set forth, and that said collision as aforesaid was occasioned by the negligence, inattention and want of proper care and skill on the part of said tug "Ada Warren," her master and crew.

VI.

That when the captain of said steamship "Meteor" saw that a collision was about to occur, and at the time that said tug "Ada Warren" changed her course, said captain of said steamship went to starboard and started his vessel full speed astern, at the same time blowing three whistles, and that said collision was not caused from any fault or omission on the part of said steamship "Meteor," her master or crew.

VII.

That said steamship "Meteor" is so injured and disabled by the force and violence with which she was struck by said tug "Ada Warren" as to make it necessary for her to dock for repairs at a time when her services are particularly valuable to your

libelant, and that your libelant has sustained damage for repairs to said steamship "Meteor" and her fixtures, and for her loss of time, and for expenses of her master and crew, and otherwise, to the amount of Seventeen Thousand Two Hundred Dollars, which said damages as aforesaid were occasioned by the negligence, want of skill and improper conduct of the persons navigating said tug "Ada Warren," and not by or through any fault, negligence or improper conduct on the part of the persons on board said steamship "Meteor." [12]

VIII.

That said tug "Ada Warren" is now within the Northern District of California and within the admiralty and maritime jurisdiction of this Honorable Court.

IX.

That all and singular the premises are true and within the admiralty jurisdiction of the United States and of this Honorable Court.

WHEREFORE, this libelant prays that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against said tug "Ada Warren," her tackle, apparel and furniture, and that all persons claiming any right or interest therein may be cited to appear and answer all and singular the matters aforesaid; that this Honorable Court will be pleased to decree the payment of said sum of Seventeen Thousand Two Hundred Dollars aforesaid, with costs and interest; that said tug "Ada Warren," her tackle, apparel and furniture, be con-

demned and sold to pay the same, and that this libelant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

SMITH & PRINGLE,

Proctors for Libelant.

Northern District of California,—ss.

J. R. Pringle, being duly sworn, says, that he is a member of the firm of Smith & Pringle, the proctors for libelant in the within matter; that libelant in said matter is absent from this District and that the principal place of business of said libelant is more than one hundred miles from the city of San Francisco, to wit, at the city of Seattle, State of Washington; that libelant has no agent duly appointed to act for it in this State, or within the [13] Northern District of California, and deponent is authorized to act herein; that the foregoing libel is true according to his information and belief; that the source of deponent's knowledge is information derived from the Master of said steamship "Meteor," which deponent verily believes to be true.

J. R. PRINGLE.

Sworn to before me this 17th day of October, 1906.

[Seal]

JOHN FOUGA,

Deputy Clerk U. S. District Court Northern District
of California.

[Endorsed]: Filed Oct. 17, 1906. Jas. P. Brown,
Clerk. By John Fougá, Deputy Clerk. [14]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 18th day of January, in the year of our Lord, one thousand nine hundred and eight. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,602.

GLOBE NAVIGATION CO.

vs.

Tug "ADA WARREN," etc.

No. 13,648.

WARREN IMP.

vs.

Steamship "Meteor," etc.

Order Consolidating Causes.

On motion of Wm. Denman, Esq., it is ordered that these causes be and the same are hereby consolidated for hearing. [15]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 13th day of February, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable JOHN J. DE HAVEN, Judge.

[Minutes—February 13, 1908—Hearing, etc.]

No. 13,602.

GLOBE NAV. CO.

vs.

Tug "ADA WARREN."

No. 13,648.

WARREN IMP. CO.

vs.

SS. "METEOR."

These causes having been heretofore consolidated for trial *and* this day came on regularly for hearing. Mr. Denman, and Smith & Pringle appeared for The Globe Navigation Co., libelant, and steamship "Meteor," defendant, and Andros & Hengstler, appearing for the tug "Ada Warren," defendant, and the Warren Improvement Co., libelant. Mr. Denman opened and introduced in evidence the depositions of T. D. McFarland, taken *de bene esse* on behalf of libelant, the Globe Navigation Company and rested. Upon motion of Mr. Hengstler, it is ordered that claimant, the Warren Improvement Company, be and it is hereby allowed to amend its answer. Mr. Hengstler thereupon called Robert W. Hammer and David O. Church, who were duly sworn and examined as witnesses on behalf of the Warren Improvement Co. and rested. Mr. Denman made M. David O. Church a witness on behalf of the Globe Nav. Co., and called Dick Miller, who was duly sworn and examined as a witness on behalf of the Globe

[16] Nav. Co. in rebuttal and rested.

Mr. Hengstler recalled Robert W. Hammer in sur-rebuttal and rested. By consent of counsel, it is ordered that the argument hereof be and the same is hereby continued until Thursday, February 20, 1908.
[17]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,602—IN ADMIRALTY.

GLOBE NAVIGATION COMPANY, LIMITED
(a Corporation),

Libelant,

vs.

Tug "ADA WARREN," etc.,

Respondent.

Answer.

To the Honorable J. J. DE HAVEN, Judge of the
District Court of United States, for the North-
ern District of California:

The answer of Warren Improvement Company, of the City and County of San Francisco, said Northern District of California, owner and claimant of the tug "Ada Warren," her tackle, apparel and furniture, to the libel of Globe Navigation Company, Limited, against the said tug, her tackle, apparel and furniture, in an alleged cause of collision, civil and maritime, alleges as follows:

I.

Claimant admits the allegations in paragraph I of said libel contained.

II.

Answering the allegations in paragraph II of said libel, claimant says that it has not information sufficient as to the matters therein alleged; and on that ground denies said allegations and calls for proof thereof; but claimant, on information and belief, denies that the master or crew engaged on board said steamship were on the lookout for the protection or safety of said vessel.

III.

Claimant denies that, at the time in said libel alleged, [18] or while said steamship was proceeding down the Bay of San Francisco, or at all, the said tug "Ada Warren" did then or there, with great or any force or violence, run into or upon said steamship "Meteor," and denies that said tug "Ada Warren" did thereby or by any act or omission on her part whatever cause great or any damage or injury to the said steamship "Meteor" or to her hull; and denies that said tug "Ada Warren" did remain foul of or upon said steamship "Meteor" until she (the said tug "Ada Warren") swayed around, or at all.

IV.

Claimant denies that said tug "Ada Warren" appeared off the port bow of said "Meteor" while said "Meteor" was proceeding on the course in said libel described; but in this behalf avers that, when said tug thus appeared or should have appeared to those on said steamship, the said "Meteor" was proceeding on her way down Carquinez Strait in the direction of San Pablo Bay, and that said tug, together with

her barge in tow, was on her way from said San Pablo Bay and about to enter said Strait. In answer to the allegation that if said tug had then and there continued on a Northeasterly course, she and her tow would have safely passed the bows of said steamship, claimant says that it has not sufficient knowledge or information as to said allegation, and therefore it denies the same and calls for proof thereof.

As to the allegation that said vessels continued on the course in said paragraph described until within a distance of about —— thousand feet, claimant says that it has not knowledge or information sufficient, and that it therefore denies the same; and denies that thereupon or at any time said tug proceeded directly against said steamship “Meteor” head on; and denies that said tug ran into said steamship with great or any force or violence or at all; and denies that said tug cut in the hull or did great general damage or general damage or great or any damage to said steamship.

V.

Claimant denies that, at the time when said vessels came together, or immediately prior thereto, said “Ada Warren” was proceeding [19] at full speed; denies that but for the improper or unskillful management of the persons navigating said tug said collision would not have occurred; denies that said collision would not have occurred if the persons navigating said tug had signified their intention to pass on the port side of said “Meteor” in proper time, but in this behalf claimant says that said intention was signified by said tug to said “Meteor” in proper

time and according to the rules of the road. Claimant denies that said tug was so improperly and unskillfully or improperly or unskillfully managed or navigated in the particulars mentioned in said libel that she was driven upon or into the said steamship; and denies that said tug was in any respect unskillfully or improperly managed or navigated. Claimant denies that the collision between said steamship and said tug was occasioned by the negligence or inattention or want of proper care or skill on the part of said tug "Ada Warren," or her master or her crew.

VI.

In answer to the allegations in paragraph VI of said libel claimant avers that it has not sufficient information as to the matters therein alleged, and on that ground denies the same, except as to the allegation that said collision was not caused from any fault or omission on the part of said steamship "Meteor," or her master or crew, and as to that allegation, claimant denies the same.

VII.

Claimant, in answer to the allegations of paragraph VII of said libel, denies that said steamship "Meteor" is so injured or disabled by the force or violence with which she was struck by said tug, as to make it necessary for her to dock for repairs, and denies that said "Meteor" was injured or disabled by any act or omission of those on board of said tug or those responsible for her management or navigation; and as to the allegations in said paragraph VII that it is or was necessary for said "Meteor" to dock [20] for repairs at a time when her services are or

were particularly valuable to the libelant, and that said libelant has sustained damage for repairs to said steamship "Meteor" and her fixtures, and for her loss of time, and for expenses of her master and crew, and otherwise, to the amount of Seventeen Thousand Two Hundred Dollars, this claimant has not knowledge or information sufficient to enable it to answer the same, and on that ground this claimant denies said allegations and each thereof specifically. Claimant denies that the damages in said paragraph mentioned or any alleged damages were occasioned by the negligence, or want of skill, or improper conduct of the persons navigating said tug "Ada Warren"; and denies that said or any alleged damages were not occasioned by or through any fault, negligence or improper conduct on the part of the persons on board said steamship "Meteor."

VIII.

Answering unto the allegations of paragraph VIII of said libel, claimant admits the same.

IX.

Answering unto the allegations of paragraph IX of said libel, claimant admits the same, save and except the allegation that all and singular the premises therein referred to are true; and as to that allegation, claimant denies the same, except as to those matters stated in said premises which are herein admitted.

FURTHER ANSWERING THE LIBEL ON FILE HEREIN, THIS CLAIMANT ALLEGES AS FOLLOWS, to wit:

That, on the 11th day of October, at the hour of

about half-past four o'clock A. M., the tug "Ada Warren," with a barge heavily laden with rock lashed to her starboard side, was about to enter the straits of Carquinez, proceeding in the direction from San Pablo Bay. That just as she was rounding a point near the place called "Oleum" and entering the said straits, a red light was seen a little to starboard by those in charge of and navigating said tug, which red light proved to be the port light of the steamship "Meteor," [21] coming down the stream at a considerable rate of speed. The tug "Ada Warren" thereupon blew one whistle to indicate her intention to go to the starboard of said approaching vessel, and ported her helm. That in the moment when said signal was given and said manoeuvre executed, it appeared to those in charge of the tug that but for said manoeuvre the fast approaching vessel of large size would strike the tug or her barge amidship and probably sink them or one of them. ~~That said signal of one whistle was not answered by said steamship, but after a short interval of time two whistles were heard coming from said steamship and simultaneously she showed her green light in close proximity.~~ A collision then appearing impending and almost inevitable, the officer in charge of the watch on the tug, in order to ease the blow which he expected the tug and her barge to receive, gave three whistles and signalled to the engineer of said tug to reverse, full speed astern. Immediately thereafter the steamship and the barge came together. That, owing to the excessive speed of said "Meteor" in the locality where said vessels met, and to her failure to

respond to and act upon the signals of the “Ada Warren,” and to the change of the “Meteor’s” course to her port, the collision between the two vessels occurred in spite of the effort of the tug to keep out of the way of said steamship; and that by the fault of said steamship “Meteor,” her officers and crew, the said tug and her barge, together with the cargo of said barge, suffered severe damage, and that the damage so received amounted to not less than the sum of ——— Dollars.

Wherefore this claimant prays that this Honorable Court will be pleased to pronounce against the libel filed herein, and that the same may be dismissed with costs to this claimant, and that this Honorable Court will give to said claimant such other and further relief as law and justice may require in the premises.

ANDROS & HENGSTLER,

Proctors for Claimant. [22]

City and County of San Francisco,
Northern District of California,—ss.

D. O. Church, being first duly sworn, deposes and says, that he is an officer, to wit, the Secretary of the Warren Improvement Company, libellant herein, and authorized to make this affidavit for said corporation; that he has read the foregoing answer and knows the contents thereof; that the same is true according to his information and belief; that the source of deponent’s knowledge in the premises is information received by deponent from the master and pilot of said steamship “Ada Warren” and that deponent verily believes the same to be true.

D. O. CHURCH.

Subscribed and sworn to before me this 23d day of November, 1906.

[Seal] CEDA DE ZALDO,
Notary Public in and for the City and County of San Francisco, State of California.

It is hereby stipulated that the within Answer may be filed *nunc pro tunc* in the above-entitled action as and in lieu of the original verified answer heretofore properly served upon counsel for libellant.

Dated February 14, 1908.

SMITH & PRINGLE,
WILLIAM DENMAN,
Proctors for Libellant.

[Endorsed]: Filed Feb. 17, 1908. Jas. P. Brown,
Clerk. By John Fougua, Deputy Clerk. [23]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,602—IN ADMIRALTY.

GLOBE NAVIGATION COMPANY, LIMITED
(a Corporation),

Libellant,

vs.

Tug "ADA WARREN," etc.,

Respondent.

Amendment to Answer.

Respondent, by leave of the Court, hereby amends the answer on file herein by striking out the following words and allegations on page 5 of said answer, to wit:

"That said signal of one whistle was not an-

swered by said steamship, but after a short interval of time two whistles were heard coming from said steamship, and simultaneously she showed her green light in close proximity."

ANDROS & HENGSTLER,
Proctors for Respondent.

[Endorsed]: Filed Feb. 17, 1908. Jas. P. Brown,
Clerk. By John Fouga, Deputy Clerk. [24]

*In the District Court of the United States in and for
the Northern District of California.*

Hon. J. J. DE HAVEN, Judge.

GLOBE NAVIGATION CO., LTD., a Corporation,
Libelant,

vs.

The Tug "ADA WARREN," etc.,

Respondent.

WARREN IMPROVEMENT CO., a Corporation,
Libelant,

vs.

The American Steamship "METEOR,"

Respondent.

[Proceedings Had February 13, 1908.]

Thursday, February 13th, 1908.

APPEARANCES:

Messrs. SMITH & PRINGLE and WILLIAM
DENMAN, Esq., for the Globe Navigation Co.,
and the "Meteor."

L. T. HENGSTLER, Esq., for the Cross-Libelant
and Respondent.

(These libels now came on for hearing in their regular order on the Calendar and the following proceedings were had.) [25]

Mr. DENMAN.—If the Court please, this is a consolidation of two cases in which I represent the libelant in one case, and Mr. Hengstler represents the libelant in the other. We have not decided between us as to which will have the opening. I suggest the clerk flip the coin for that purpose.

The COURT.—It is not necessary to do that.

Mr. HENGSTLER.—Your case is the first one, Mr. Denman, and you moved for the consolidation.

The COURT.—Where the case is tried before me, it does not make any difference who has the opening or the closing. I will hear all the testimony that the parties have to offer. It does not make any difference whether a witness comes first or last.

Mr. DENMAN.—No, but it may to counsel trying the case. It is sometimes of advantage to have the position of being able to observe the opponent's case, and how he handles it. Both of us consider it of value and I suggest that it be determined by lot.

The COURT.—That is a new method of trying a case. I do not think it makes a particle of difference which opens or which closes, so far as the testimony is concerned.

Mr. HENGSTLER.—May I say a word, if your Honor please? It is not a case where the rights are equal. A libel was filed by the libelant whom Mr. Denman represents, and our libel was filed later. Recently, on the motion of Mr. Denman, the two cases

were consolidated. I was not represented on that motion. He had them consolidated himself. His evidence, I think, from what he indicated this morning, is all in. I think we ought to know whether he intends to have any more witnesses or not before we go ahead with our case.

The COURT.—If you think all his testimony is in, proceed with yours, and if he has any in rebuttal he can put it in.

Mr. HENGSTLER.—It is really for him to say. He moved for the consolidation. I did not move to set my case for hearing. It was Mr. Denman who moved to set his case for hearing. It was his motion which was granted. [26]

The COURT.—Are they the same cases? They do not seem to be the same parties.

Mr. DENMAN.—The respondents are the two colliding vessels.

The COURT.—How do you get on both sides of the case?

Mr. DENMAN.—In the first case, the Globe Navigation Company sued the tug “Ada Warren” for a certain collision. The Globe Navigation Company are the owners of the steamship “Meteor,” the other party to the collision. Then the owners of the “Warren” sued the “Meteor.” I appear for the owners of the “Meteor” in the Globe Navigation case, and I appear for the “Meteor” in the other case. In other words, it is ship against ship. The Globe Navigation Company case should be “Meteor” against “Ada Warren,” and the other case of the Warren Improvement Company should be “Ada

Warren" against "Meteor."

The COURT.—Does neither party want to proceed?

Mr. HENGSTLER.—I think it is very clearly a case where Mr. Denman should proceed.

Mr. DENMAN.—Very well. I offer in evidence, if your Honor please, the deposition of Captain McFarland, and I ask that during the taking of the testimony of my opponent's witnesses, the other witnesses be sequestered, as there may be a conflict of testimony. I desire to have the chance of examining the witness without the others being present.

The COURT.—That is your testimony, that deposition?

Mr. DENMAN.—Yes.

The COURT.—Proceed with yours, Mr. Hengstler.

Mr. DENMAN.—May I have sequestration of the witnesses?

The COURT.—Certainly. I suppose there will be one called to the stand pretty soon.

Mr. DENMAN.—I intend to call Mr. Church in rebuttal.

The COURT.—Call your witness. The other witnesses will retire from the courtroom but will remain in the hall at the call [27] of the Marshal.

Mr. HENGSTLER.—If your Honor please, at this stage I am compelled to move for an amendment to my answer. The answer states some facts which I am not able, after investigation, to prove, and I move to amend the answer by striking out the allegation on page 5 of the answer to the following effect.

The COURT.—In what case?

Mr. HENGSTLER.—In the first case, the Globe Navigation Company against the tug “Ada Warren,” and the corresponding portions of the libel in the other case. The answer in the first case, and the libel in the second case, are practically the same. That portion is this, on page 5 of the answer: “That said signal of one whistle,” etc. (Counsel reads down to the words “close proximity.”) That was the fact as it was at the time given to Mr. Church, who verified this libel, but upon further information we are not able to prove that fact, and I move that this allegation be stricken out in the answer, and the corresponding allegation in the libel in the other case.

Mr. DENMAN.—It is admitted that that communication was made to Mr. Church.

Mr. HENGSTLER.—That communication was made to Mr. Church, that is admitted; otherwise it would not have appeared in either the answer or the libel.

[Testimony.]

[Testimony of Robert W. Hammer, for Cross-libelant and Respondent.]

ROBERT W. HAMMER, called for the cross-libelant and respondent, sworn.

Mr. HENGSTLER.—Q. Captain Hammer, what is your name, age and occupation?

A. Robert W. Hammer; 32 years old; employed as master of the steamer “Dauntless” at the present time.

Q. How long have you been master of the steamer “Dauntless”?

(Testimony of Robert W. Hammer.)

A. With the exception of a few months that I was with the Warren [28] Improvement Company, I have had her for four years.

Q. Has the steamer "Dauntless" a regular run or otherwise? A. A regular run.

Q. What is her run?

A. From San Francisco to Selby's; there to South Vallejo; South Vallejo to Crockett and Port Costa Warehouses and back to San Francisco, daily.

Q. You have been making that run for four years now? A. Yes, sir.

Q. Are you familiar with the waters of the bay between San Francisco and Carquinez Straits, particularly with the entrance to Carquinez Straits.

A. Very familiar with them. I have to make one round trip a day there no matter what the weather conditions are.

Q. You were the master of the "Ada Warren," were you not, in October, 1906? A. I was.

Q. What trip was the "Ada Warren" engaged in on the night of October 11th, 1906?

A. Running from the Atlas Rock Company, at Point San Pedro, to Ryer Island.

Mr. DENMAN.—Q. How far was that?

A. The complete trip?

Q. Yes.

A. It ranged from 61 to 63 miles. We were rip-rapping a levee up there for a couple of miles.

Mr. HENGSTLER.—Q. What part of the bay is the quarry at San Pedro located on?

A. It marks the northwesterly point of the di-

(Testimony of Robert W. Hammer.)

vision line between San Francisco and San Pablo Bay, protected by the northern extremity where the San Francisco Bay ends and the San Pablo Bay starts, better known as The Brothers, where The Brothers' light is.

Q. How long before October 11th had you been taking this run from San Pedro Point through Carquinez Straits?

A. I took the "Ada Warren " in June.

Q. How often did you make the run?

A. A round trip every day. [29]

Q. Can you describe the first part of that trip from San Pedro Point to Carquinez Straits?

A. There is not much that I can describe. We brought the empty barge down that night. I got up and docked the barge, made up the tow with the loaded barge and started her off on her course, and went to bed again. That is all I can describe of the starting of the trip.

Q. The tug was towing that barge across the bay of San Pablo? A. Towing up the bay.

Q. What is the relative size of the tug and the barge?

A. The barge I had that night is 130 feet long. The tug is 75.

Q. Did you make these two models yourself (handing)? A. Yes, sir.

Q. Kindly tell the Court what this model represents. (Pointing.)

A. This represents the barge, the light at each end, and the relative position of the tug alongside of

(Testimony of Robert W. Hammer.)

her, with her lights, the red and green light, and two towing lights.

Q. What does the other model made by yourself represent?

A. That represents the "Meteor." I made a mistake in the dimensions; I made these to scale. I thought her dimensions were 250 feet.

Q. As a matter of fact, is the "Meteor" larger in proportion or smaller?

A. Larger. She is 253.6 feet long.

Q. So that these models are made to scale except that the "Meteor" is somewhat too small?

A. Yes, sir, she is somewhat longer, 25.6 feet.

Q. Has the barge any independent method of locomotion, any steering gear?

A. In that respect she is not a barge; she is a lighter. If she was a barge, she would have rudders. She is absolutely helpless without the power of the tug, or another vessel.

Q. What was she loaded with that night?

A. With skips of rock, they call them.

Q. Is that a heavy load or otherwise?

A. A very heavy load, a dead one. [30]

Q. How deep was she in the water? A. Which?

Q. The lighter.

A. The lighter would be drawing 7 feet.

Q. And the tug?

A. She was just oiled up. The tug was drawing, I guess, 11 feet 6.

Q. What course is laid out by navigators, and has been laid out by you, in going across San Pablo Bay?

(Testimony of Robert W. Hammer.)

A. River-men, as a general rule, take out the whistling buoy to locate abreast of Pinole Point. Then we take a course from the whistling buoy straight for Selby's. In fact, on the "Ada Warren" I demanded that any pilot working for me should steer my courses, because during the foggy season I knew if he ran into a fog and called me, if he steered my course, all I would have to do would be to look at my watch and I would know where I was at.

Mr. HENGSTLER.—I offer these models in evidence, if your Honor please.

Q. What is this chart that I show you?

A. It is a chart of San Pablo Bay, and a small portion of San Francisco Bay, too.

Q. Please indicate to the Court the course which you take from San Pablo to the entrance of Carquinez Straits.

Mr. DENMAN.—I object to the question on the ground that it is not shown that this vessel took that course, and on the ground that I understand the witness was in bed at the time and did not see any of it.

The COURT.—Let it go in.

A. Here is the Atlas Rock Company right here (pointing). I would come to the north of The Sisters, and take the course to pick up the whistling buoy. It is better than a mile off Pinole Point.

Mr. HENGSTLER.—Q. At the point marked capital A?

A. (Contg.) Then with the "Ada Warren," the course was east northeast on a flood tide. We would pick up Selby's at the lead wharf. [31]

(Testimony of Robert W. Hammer.)

Q. At the point marked capital B.

A. We would pick up Selby's. We always made it a practice of picking up Selby's on account of the fishermen, and the set of the tide also.

Q. The line on this chart from A to B is, then, the course that you prescribe for your pilot?

A. That line would be practically the course which the barge would take at east northeast, heading in all the time for the drift of the current to set up there.

Q. Where is the channel across San Pablo Bay on this map?

A. It is marked on this dotted line on the chart here. In reality it is marked on the north side by three buoys from the lower end, and by eight-pile beacons.

Q. What do they indicate to the navigator in San Pablo Bay?

A. They indicate to him, if he gets to the north of them, he is apt to stay there.

Q. Why?

A. He will get over on the Sonoma Flats, and the bottom is pretty close to the top.

Q. North of that line are the flats?

A. It is practicable to run a bit north, if you had any business north over there, but he would be losing time to do so. You could not go very far to the north of them.

Q. Have you ever in making that run gone to the north of them yourself? A. No, sir.

Q. You give instructions to your pilots to follow

(Testimony of Robert W. Hammer.)

this course from A to B? A. Yes, sir.

Mr. HENGSTLER.—I offer this chart in evidence.

Q. That night of October 11th, when the “Ada Warren” with her lighter approached Carquinez Straits, you were not on deck?

A. I was not, no, sir.

Q. Who was in charge of the vessel at that time?

A. Captain Oden.

Q. Who is he?

A. He is a licensed pilot. [32]

Q. Who selected him for this work of running the “Ada Warren”? A. I did.

Q. Was he a competent pilot?

A. I chose him out of a great many. During October, when the summer boats are laid up, there are lots around. I did not choose him because I liked the man personally, either; he is steady and sober, and I knew that.

Q. Do you know, Captain, what the tide was at the time when the “Ada Warren” arrived at the entrance of Carquinez Straits?

A. Yes, sir; it would be about two hours gone on the first rush of it.

Q. What kind of a place is that entrance with reference to tide and currents, an easy place to navigate or otherwise?

A. It is not. A fellow has got to know just about what he is doing going through the entrance.

Q. Why?

A. The drifts of the tides set very strongly there. It acts like the spout to a funnel. The whole set of

(Testimony of Robert W. Hammer.)

the tides are going into that small strait. There are swells and eddies. If a fellow is navigating a boat of any size, it is apt to throw him out and turn him around.

Q. Must the currents in that neighborhood be taken into consideration in navigating a vessel either from San Pablo Bay to Suisun, or in the opposite direction? A. Most decidedly.

Q. Would you call it a dangerous place for navigation?

Mr. DENMAN.—Do not lead him; he is quite willing enough. Ask him what he calls it.

Mr. HENGSTLER.—Q. In your opinion, is there any danger in passing this place in navigating a vessel?

A. No, sir, not if a fellow knows what he is doing. If he knows the water and currents, there is no danger.

Q. If he does not take into consideration the currents and locality, what then?

A. If he did not know the place, he would be apt to get in trouble; that is all. [33]

Q. Now, Captain, in approaching the entrance to Carquinez Straits, what place is on the right-hand side of the vessel—at the entrance?

A. Right at the entrance would be Selby's. Oleum would be there, too.

Q. Oleum comes first and Selby's second, coming from San Pedro Point?

A. Yes, sir. I never did know just what place marked the entrance, there is so little difference

(Testimony of Robert W. Hammer.)

between the two places.

Q. In approaching the direction from Oleum towards Selby's, or in the course that you laid out through there, can you look down Carquinez Straits?

A. I did not get that question.

Q. In making the approach in the direction you laid out on the chart towards Selby's, can you, while getting near to Selby's, look down Carquinez Straits?

Mr. DENMAN.—Objected to as indefinite.

The COURT.—I overrule the objection. I will hear all the testimony; whatever is irrelevant has no bearing on the case.

Mr. DENMAN.—That line is two miles long. He says, "As you were approaching on the line." It is quite apparent you may have various points of observation. The question is utterly unintelligible.

The WITNESS.—The line that Mr. Hengstler was talking about is about 12 miles long.

Mr. DENMAN.—It does not indicate what point.

The COURT.—All that is matter for argument. I want to get the testimony in.

Mr. DENMAN.—The question is not intelligible.

The COURT.—Then the witness cannot answer it.

Mr. HENGSTLER.—Read the question, Mr. Reporter.

(The Reporter reads the previous question.)

A. No, sir, you cannot. That is, you cannot look up them.

Q. Why not?

A. You would have to look through the hills. [34] Carquinez Straits goes at an angle of 35 degrees off to the right.

(Testimony of Robert W. Hammer.)

Q. Those hills are marked on the chart there, are they not?

A. I did not look. (After examination.) Yes, they are marked there.

Q. How near must you get to Selby's or beyond Selby's—to what point beyond Selby's must you get with the vessel before you can look down Carquinez Straits?

Mr. DENMAN.—I object to all this line of testimony on the ground that it is not shown that the Captain sailed on this voyage that night. This man was not there, and there is nothing to show that that vessel followed that particular line.

The COURT.—That will be counsel's misfortune, if there are no facts in the case that will have any application to the testimony. I cannot tell until I hear all the testimony.

Mr. HENGSTLER.—I will prove the facts in the best way I can. I may not be able to prove them in an ideal way, but I will prove them in the best way I can.

The COURT.—Answer the question.

A. You would have to get right to Selby's coming on that line—you would have to get right to the middle wharf at Selby's to look up the Straits.

Mr. HENGSTLER.—Q. You would have to get to the middle wharf at Selby's before you could look up the Straits? A. Yes, sir.

Q. There is a sharp bend there? A. A point—

Mr. DENMAN.—Do not lead him.

Mr. HENGSTLER.—Q. What is the reason why

(Testimony of Robert W. Hammer.)

you cannot look down the Straits until you get to the middle wharf at Selby's?

A. Because there is a high bluff of land between your course and the Straits.

Q. What is between them? You stated there was a hill. Is there anything else?

A. Wharves and warehouses. [35]

Q. In the night-time, in running that distance what is the condition of that neighborhood with reference to light and darkness?

A. Well, the Contra Costa shore, from Selby's up, is lit up. The Solano shore would be black. It would be totally dark until you got up to Benicia. All along from Selby's are the lumber yards, the brick company, and sugar mills. That is lit up all along that shore to Port Costa.

Q. What is the ordinary course of navigation of a vessel entering Carquinez Straits with reference to the distance from Selby's?

A. Oh, that varies; they all run pretty close. Take these river steamers, they come right up along the wharves, close in—skim the wharves, you call it; they keep pretty close in.

Q. Is there any reason for remaining close to the Selby's wharf in entering the Straits?

A. The reason for that is—the only reason I did ever hear of it was,—most all the river men that I know do it,—because in a fog it is an easy point to pick up and follow that shore. You get an echo from your whistle, from Selby's, when you cannot just hear the bell at Mare Island.

(Testimony of Robert W. Hammer.)

Q. Have the currents anything to do with it?

A. Yes, sir, the currents have. If a fellow gets too close over to that north shore it is apt to put him ashore.

Q. The current is running over to the north shore?

Mr. DENMAN.—Objected to as leading.

A. Yes, sir.

Mr. HENGSTLER.—Q. How does the current run between Selby's and the north shore?

A. I presume you are speaking about the flood tide—the tidal conditions that night.

Q. Yes.

A. Coming up on the south the current takes over from Selby's to a point just above the north entrance to the Vallejo Straits. There is another current there. The natural trend of the water is straight up, and the current sets over.

Q. In what direction?

A. That is, the body of water would be [36] moving up.

Q. Up the Straits?

A. Yes, sir. There are two counter currents in there, and a very heavy eddy on the north side.

Q. Captain, supposing a vessel is sailing in the night-time in a direct line from Selby's to South Vallejo, how far up the Straits must another vessel be in order to see the lights of the first vessel?

A. Going from Selby's to South Vallejo?

Q. Yes.

A. He could see the lights anywhere from Crockett down.

(Testimony of Robert W. Hammer.)

Q. What is the distance from Crockett to that line that I indicate?

A. About a mile—in statute miles—about a mile and a little better than half a mile.

Q. Is Crockett the end of the Straits?

A. No, sir.

Q. Why could you not see any further?

A. At Crockett they take another decided turn to the right, to the southward, until they get to Port Costa.

Q. Did you see the collision between the “Ada Warren” and the “Meteor” that night?

A. No, sir.

Q. Where were you? A. I was in bed.

Q. What did you do when the collision happened?

A. I gathered up what was left of me and got out on deck as quick as I could.

Q. What did you notice with reference to the place where the “Ada Warren” and the “Meteor” were at that time?

A. To tell you the truth, right at that time I did not notice; I ran forward to see what was coming off. I could not get things through my head right clearly that instant, and directly after that I looked—I took a look around me. The Selby side was naturally clear; there was a southwest wind and that blew the steam away from my boat.

Q. Where were you when you took that observation?

A. I was about a quarter of a mile, I should judge, off of the shell factory at Selby’s. [37]

(Testimony of Robert W. Hammer.)

Q. Now, Captain, assuming that the “Ada Warren” followed the regular course which you have described from Oleum to Selby’s and around the turn, how long, in your opinion, would her green light have been visible to a vessel coming down the Straits from Port Costa before the “Ada Warren” got to the place where the collision happened, as you have stated?

Mr. DENMAN.—You do not say which side of the Straits you are on coming down. It is a mile wide.

A. It varies from a half a mile to a mile and an eighth.

Mr. HENGSTLER.—Q. Assuming that the other vessel come down in the middle of the channel?

A. If she is coming down in the middle of the channel, the vessel coming on the prescribed course, I suppose she could see us maybe half to three-quarters of a mile above Selby’s—half a mile, perhaps.

Q. Half a mile above Selby’s? A. About that.

Q. You mean before your vessel would arrive at the point where the collision happened?

A. Yes, sir.

Q. The other vessel could see you a half a mile above Selby’s?

A. About that; that is, provided she was in the middle of the channel. If she was coming down the south side, she could not see us at all until we got to Selby’s.

Q. Supposing she came down on the south side, how much time would she have to see you?

A. Do you mean just where we were rounding that point?

(Testimony of Robert W. Hammer.)

Q. Yes.

A. She would not see us until we got right there at Selby's. It is an abrupt point there, and they are all warehouses and wharves there.

Q. Who was on the lookout that night, Captain, on the "Ada Warren"?

A. One of the deck-hands.

Q. What was his name?

A. Louis Kettleson. [38]

Q. Have you seen him since?

A. Yes, sir, I have seen him since.

Q. How long ago? A. A year ago, I guess.

Q. Do you know where he is now? A. No, sir.

Cross-examination.

Mr. DENMAN.—Q. You saw him a year ago, you say? A. About that.

Q. That was after this case was commenced, Captain, was it not?

A. I did not know the case was commenced until a week ago.

Q. That was after the investigation by the United States Inspectors?

A. Yes, sir; I saw him after the investigation, and I have seen him since that.

Q. Did Mr. Hengstler at any time ask you to procure Kettleson for the purpose of taking his deposition? A. Yes, sir.

Q. How long ago?

A. I don't know whether it was a deposition; he took a statement from him.

Q. Did you give that to Dr. Hengstler?

(Testimony of Robert W. Hammer.)

A. Did I give it to who?

Q. Did you give the statement to Dr. Hengstler?

A. To Mr. Hengstler?

Q. Yes. A. I did.

Mr. DENMAN.—I ask you to produce that statement, Mr. Hengstler.

Mr. HENGSTLER.—Counsel knows—I have explained it to Mr. Denman several times—he seems to doubt the fact that that statement has been mislaid.

Mr. DENMAN.—I did not know but what you had found it.

Mr. HENGSTLER.—I have not seen it. It evidently got into the papers in another case. I am myself in the same predicament in which he is, that I have not got that statement. I cannot find it and cannot produce it. I should like to have it. I would produce it if I had it. [39]

Mr. DENMAN.—Q. Captain, you do not know what course the “Ada Warren” took on that night?

A. I do.

Q. Of your own knowledge? A. Yes, sir.

Q. What time did you retire? You remember testifying before the United States Inspectors, don't you? A. Yes, sir.

Q. You were under oath at that time?

A. I am quite aware of that fact.

Q. They were then trying Oden upon the question of neglect in this matter, were they not?

A. They were trying Oden and McFarland both.

Q. What time did you retire that night?

A. It is a long time ago. It was around 2:30.

(Testimony of Robert W. Hammer.)

Q. Tell us about the time that you left Point San Pedro.

A. Shortly after. I probably had a cup of coffee; I don't remember whether I did—shortly after.

Q. And you did not wake up until the collision occurred? A. No, sir.

Q. You did not know, then, of your own knowledge what course she took? A. Yes, sir.

Q. Of your own observations?

A. Not of my own observation.

Q. Now, Captain, describe to me—first give me the distance between Selby's and the north shore—the north shore, mind you—of the Straits.

A. Directly across?

Q. Directly across there. Look at the map.

Q. There is no shore directly across.

Q. Look at the map and see.

A. Directly across it takes in Vallejo Straits.

Q. How far would it be to that shore?

A. Where?

Q. At the point on this map below the words "U. S. Reservation," and at the place marked T?

A. You mean where that Government jetty joins the shore line? [40]

Q. Yes.

T. I could not give you the distance exactly there, because I never had any occasion to run over there and find out. I should judge it is about a mile and a quarter.

Q. That is the shore that you would see looking directly across the stream?

(Testimony of Robert W. Hammer.)

A. Yes, sir; I could see all that shore.

Q. Looking directly across the stream from Selby's?

A. Yes, sir, you would see all the way along that shore there and up here also (pointing). Looking straight across, you would look probably at Starr's Mills.

Q. Looking across the stream from Selby's to the nearest shore point on the other side, how far is it?

A. A mile and an eighth, but that is upstream some.

Q. That is the nearest point?

A. The nearest point.

Q. Do you remember testifying, when you were under oath before the United States Inspectors, where you were when you came up; that after the steam had cleared away that you were midway between the north and south shore? A. Yes, sir.

Q. And how do you account for that statement?

A. How do I account for that statement? Because I was.

Q. Midway between the north and south shore?

A. Yes, sir.

Mr. HENGSTLER.—Read that question to him, Mr. Reporter.

The WITNESS.—I testified to it.

The COURT.—The witness says he understands it thoroughly, and he did testify to it.

The WITNESS.—I was, after the steam cleared away.

Mr. DENMAN.—Q. Do you remember testifying

(Testimony of Robert W. Hammer.)

that you could not see until the steam cleared away?

A. I don't remember testifying to that. I remember that I testified that I could not see the north shore. If I testified to anything like that, that is what I meant. You can always look to windward of your vessel, no [41] matter how thick the steam is.

Q. Looking to the windward of your vessel, which would enable you to see the south shore and the line you describe, it is your impression that you were half way between the north and south shore?

A. No, sir.

Q. That is what you said? A. No, sir, I did not.

Q. You say there is a cross current in that space between the jetty, the point about half a mile off of it? A. I don't understand you.

Q. And that the water space triangularly inclosed is about as follows, that is to say, between the point of the jetty— A. You mean the light.

Q. Yes.

A. The light on the end of the Government jetty.

Q. Yes, about half a mile upstream, where the points comes out on the north shore.

A. The first highland, as they call it.

Q. And the point called Selby's.

A. I do not get the trend of your question.

Q. In the triangle inclosed by those three points you say there were cross-currents, two counter currents? A. That is not two counter currents.

Q. Where are they?

A. A cross current runs from Selby's, that is comes out below Selby's and runs to that point that

(Testimony of Robert W. Hammer.)

we have termed the first highland. Then there is a current which comes up the north ship channel. The greater portion of that goes up the Vallejo Straits. Do you get how I am trying to explain it? In that triangle that you have drawn there, or spoken of, that is consumed more or less by the eddies or swells, and there is a big flat makes out there now. It was not so prominent at that time. Since then they have put their jetty in and up to the present time there is a big flat runs out there and it was there at that time. The current sets from Selby's over to the first [42] highland, as we have termed it; that is, a rush of water taking a sweep over there. Another current comes up parallel to that and sweeps into the Vallejo Straits. The suction of those two currents forms more or less of a slack water or eddy. It would be on the north side that you will find those eddies. Those eddies have formed a deposit or flat there now since they have put that jetty in.

Q. Where does this water come from that you say comes around the point? A. From the bay.

Mr. DENMAN.—The chart is in evidence, I suppose.

Mr. HENGSTLER.—The chart is in evidence.

Mr. DENMAN.—Q. Now, suppose, if instead of taking the ideal course you have described, the tug, in order to get the benefit of the incoming tide and being swung by the tide to the northward, as I understand you to say, the general trend of the tide water is to the northward?

A. Up here (pointing).

(Testimony of Robert W. Hammer.)

Q. As a matter of fact, the tide runs across these flats, does it not?

A. Yes, sir; if there was any tide running across it would deepen them up. The tide takes down here (pointing), the sweep of the deep channel.

Q. Supposing *how* that the vessel sweeping with the tide and curving up the channel should arrive at the point marked D on this map, and supposing that the steamship "Meteor" coming down the stream should arrive at the point marked X below Glen Cove—

A. (Intg.) Abreast of Glen Cove. It is really abreast of Glen Cove.

Q. —could the "Meteor" have then seen the "Ada Warren"?

A. She could, if a man was fool enough to go out there.

Q. Under which line does that combination proceed up the stream (pointing to Ex. A). Is the starboard side of the barge presented to the line of the waters in front, or does the barge go straight ahead and the port side of the tug present itself to the waters [43] ahead? A. Well—

Q. I am asking you for the result.

A. I am trying to explain it.

Q. I want to know what side is presented to the waters?

A. If there is anything straight ahead of the barge?

Q. Yes.

A. Neither side. If there is anything straight

(Testimony of Robert W. Hammer.)

ahead of the barge, neither side.

Q. The barge moves straight ahead?

A. In the course of towing.

Q. As it moves up the stream, propelled by the tug, in the position you show there?

A. She does not. I was going to explain that to you but you cut me off. In towing, the line that gives the barge its momentum is from this bitt on the barge to this cavel on the tug. When that barge has got headway, she is heavy, and will tend to go straight. The tug lying at that angle will tend to shove her over. She will move on a line a little nearer a straight line with the barge than the center of the tug. You see what I mean. Like that (illustrating). You see the idea.

Q. Then the right or starboard bow of the lighter will cut the water first?

A. Practically, the whole bow.

Q. Then she is coming straight on?

A. Not exactly, but it will break the water across that line.

Q. The first point to break the water will be the starboard bow of the barge, will it not, the point nearest to destination? A. Yes, sir.

Q. That is a resultant between the V formed by the two boats?

A. Yes, sir; it is not the corner absolutely that breaks it.

Q. I understand that.

A. It would be a very small angle.

Q. In other words, the barge being heavier than the

(Testimony of Robert W. Hammer.)

tug, the angle of the tug would be more out of the line of progression ahead than the barge would be out?

A. Very slightly. It would about break between the angle.

Q. As a matter of fact, is not the barge about five times as [44] heavy as the tug? A. Yes, sir.

Q. About?

A. Pretty nearly; four times, you might say.

Q. Does she not present about four times the bottom exposure to the surface of the waters?

A. I could not say that offhand. I can figure the displacement of both vessels, if you want me to.

Q. Then I am to understand that the green light of the towboat, as this combination moves ahead, is further to the right of the line of travel of the combination of tug and tow than it would be if the tug was coming straight ahead without a tow? That is a fact, is it not? A. Very slightly, yes.

Q. You have drawn this to scale an angle, have you not? A. Yes, sir, practically.

Q. Now, Captain, do you recollect the following testimony given before the Inspectors; page 15, in the middle of the page:

“Inspector BOLLES (To Captain Hammer).

Q. Where was the vessel when you came on deck after the collision?

Captain HAMMER.—A. As soon as I could see, after the steam cleared away, I could see Vallejo Junction Ferry slip plainly. I couldn't see the jetty that they put in on the Solano side;

(Testimony of Robert W. Hammer.)

it is across from Mare Island marking the north entrance to the Straits—to the Vallejo Straits. I could see the light, but I couldn't see that jetty that goes right across. The flood tide sets across on the shore there.

Q. How far were you in relation to the distance across, to the best of your knowledge?

A. About halfway across, sir.

Q. When you came on deck the barge had parted her lines?

A. Yes, sir; I couldn't see the barge at all."

Do you recollect that testimony?

A. I testified in there after the steam cleared away, didn't I?

Q. The question was, where was the vessel when you came on deck [45] after the collision?

A. I said after the steam cleared away, she was halfway across.

Q. Did you make that statement?

A. I did, and I do it now, that after the steam cleared away she was about halfway across.

Q. That was as soon as you could see?

A. I could see off to windward before that.

Q. You stated here "as soon as I could see."

Mr. HENGSTLER.—To the northward.

A. That is naturally implied. Anyone would know that you can look to windward. As soon as I could get the contour of both shores, after the steam had cleared away, I could see, as I stated there. The steam must have been cleared away for me to see the light on the north side; I was then about halfway

(Testimony of Robert W. Hammer.)

across. That was the trend of Captain Bolles' question from the previous question, if I remember right; it is a long time ago, over a year ago.

Mr. DENMAN.—Q. How much of a shock did the barge receive by the collision? A. A hard shock.

Q. How about the tug?

A. It shook it up pretty bad.

Q. What injury was done to the tug?

A. It threw the boilers off the saddle; threw the engine out of line; threw it up against the bulkhead—not the bulkhead, but a beam that crosses the engine-room between the boiler and engine; threw the high pressure valve steam chest against that bulkhead; broke the winch-pipe—I don't just remember, but I think it broke some of the pipes to the pumps; I don't think the main pipe was broken.

Q. Any injury to the hull?

A. It loosened her fastenings up.

Q. How about the bow?

A. I did not do anything with the bow.

Q. The bow was straight?

A. I never noticed it. I noticed she was not making water, that is enough to bother a fellow any.

Q. These two cross currents which you speak of, where did they run? A. San Pablo Bay. [46]

Q. The two cross currents you speak of in the entrance to Carquinez Straits, where did they run—from where to where?

A. I explained to you a little while ago that one—I could dot it off for you on the chart pretty good, if you want me to. There is a current comes up this

(Testimony of Robert W. Hammer.)

ship channel (pointing).

Q. You need not mark that.

A. That will split here, and part of it will go in there and part in there (pointing), and that makes another split. Some of it washes up on that shore. Another current comes up along these flats and it breaks here. It is a wide stream like any current and it splits up against that point. It takes the contour of the land where the deep water is in here, and there would be more or less eddies. That jetty at that time was practically new.

Q. How should the water that is east of the jetty on a flood tide going up get upstream?

A. It does not. This tide breaks here, and it forms all tidal eddies. That is what has filled it up.

Q. So that if the barge were found to have come up in a course that brought her in those tidal eddies, it would be negligence on the part of your pilot to bring her there? A. Decidedly.

Q. And if it were found that the barge, in view of the current that you speak of, and the heavy set that you speak of from south shore to north shore, had come up midstream, it would be negligence on the part of the pilot?

A. I did not speak of any set that set directly from the south shore to the north shore. It sets across this point to a point that lay a mile and an eighth practically above.

Q. There is a set there, and a constant drift of the water upstream?

A. Yes, sir, the tide is rising. The general trend

(Testimony of Robert W. Hammer.)

of all the water is up.

Q. You are a licensed pilot? A. Yes, sir.

Q. Let me ask you, how many points you would set your course over [47] coming up under ordinary conditions in order to avoid that set towards the north shore?

A. It is all according to the boat I had and to the wind and the weather conditions and the time of the tide.

Q. Supposing it was an extremely light southwest wind.

A. The conditions that night? Is that the idea?

Q. We have not shown what they are. Suppose there was an extremely light southwest wind that you call "light airs," the barge a very heavy rock barge, the tug such a tug—by the way, what is the power of your tug? A. 260 horse-power.

Q. In good condition at that time? A. Fine.

Q. With such a tug as you had there, how many points would you set her over?

A. Strapped up in the same way to the starboard side that that model is?

Q. Yes.

A. From her regular running course, I should allow about a point and a half. That would drift all the way from here (pointing); that is, I would allow it from the whistling buoy. That would not be a point and a half magnetic nor true north.

Q. It would be a point and a half inshore from the middle of the channel?

T. From her own course; she would have her own

(Testimony of Robert W. Hammer.)

deviation plus the variation.

Q. Let us suppose that you are at Selby's, half a mile north of Selby's.

A. That would be right here (pointing).

Q. That would be here, say at the point "I" in "Carquinez," and your course was headed directly up midstream (pointing), how many points in would you turn to the south to avoid this cross current that you speak of? A. With the barge and tug?

Q. Yes. A. About a half a point.

Q. In other words, to keep her off the north shore, you would only have to turn her in half a point?

A. From the point marked "I." [48]

Q. That means, then, that the great volume of water and the great force of the current was directly upstream? A. Yes, sir; naturally.

Q. Where does the current go directly up the channel?

A. It breaks away from here and follows up here (pointing).

Q. From the point marked "14 dk M."

A. Dark mud. It comes across here (pointing), these dotted lines, and breaks away and spreads out into the channel.

Q. To avoid that, you would turn in half a point from her course?

A. That is, if it was at the point marked "I"; that is, with the barge on the tug's starboard side. That is the way she was struck up there.

Q. Supposing the tug were on the other side.

A. I would allow a whole lot more.

(Testimony of Robert W. Hammer.)

Q. In other words, the tendency of the tug is to take her off to starboard? A. Yes, sir.

Q. Do you remember Captain Oden testifying before the Inspectors?

A. Yes, sir. I remember him testifying.

Q. You had your lights in proper place?

A. Yes, sir.

Q. And proper towing lights? A. Yes, sir.

Q. You saw those before you started?

A. Yes, sir; and I saw them after we stopped, too.

Redirect Examination.

Mr. HENGSTLER.—Q. Do you remember that point marked “D” by Mr. Denman on the chart?

A. It is right where the channel breaks out from the dredged channel.

Q. You know what point I am speaking of?

A. Yes, sir.

Q. In approaching the Straits, have you ever touched that point with your tug and barge?

A. No, sir.

Q. Have you ever seen anybody touch that point?

A. I have never seen a riverman go up that way.

[49]

Q. How near from the line in the bay that you described would that point be?

A. I could not say offhand just where it would be. From the line of beacons, you mean?

Q. Yes. A. That point is right on them.

Q. Right on the line of beacons?

A. There is a beacon right where the dredged chan-

(Testimony of Robert W. Hammer.)

nel splits and opens up into the natural deep water channel.

Recross-examination.

Mr. DENMAN.—Q. The point “D” is at the extreme easterly end of the regular ship channel?

A. Of the dredged channel, the two dotted lines.

Q. That channel is the regular course of deep water vessels?

A. That channel was dredged on account of the Navy vessels.

Q. That is the regular channel for deep water vessels coming up to Carquinez Straits? A. Yes, sir.

Q. Are you interested in the Warren Improvement Company? A. Not in the least.

Q. Are you related to Mr. Church? A. No, sir.

Q. Are you in their employ now? A. No, sir.

[Testimony of David O. Church, for Cross-libelant and Respondent.]

DAVID O. CHURCH, called for the cross-libelant and respondent, sworn.

Mr. HENGSTLER.—At this point of the case, if your Honor please, I have to make a statement. It appears from the testimony of Captain Hammer that on the night in question, when the collision occurred, the “Ada Warren” was in charge of Pilot Oden, and that there was a lookout, a seaman by the name of Kettleeson. I intend to show by Mr. Church, if your Honor thinks it necessary, that Mr. Church, or his company, made attempts to find this man [50] Kettleeson, who was on the lookout and to locate him, and have been unsuccessful in finding him. In re-

(Testimony of David O. Church.)

gurd to the Pilot Oden, I asked Mr. Church to use every effort to locate him, and Mr. Church informed me that he hired a man for the purpose of finding him, and was unsuccessful in finding him until last Saturday; that then we had a conference with reference to Oden, and went carefully over his testimony given before the Local Inspectors. I am sorry to say that that testimony, which was taken on two different dates, shows that he seems to have changed his mind between the first date and the second date, for some unaccountable reason, so that we cannot call him as a trustworthy witness. After Saturday we gave up the attempt to find him and call him as a witness. That is the unfortunate predicament we are in in this case, if your Honor please. We shall have to rely entirely, outside of the evidence given by Captain Hammer with reference to the locality and the circumstances surrounding this occurrence, upon the evidence as it appears in the depositions on the other side.

The COURT.—Then you rest your case?

Mr. HENGSTLER.—We are satisfied that their own testimony shows that the collision was the fault of their side. I call Mr. Church for the purpose of showing these facts.

The COURT.—You can consider that testimony given.

Mr. DENMAN.—I should like to examine Mr. Church.

The COURT.—It is simply as to that matter. Mr. Hengstler has simply given his reasons for not call-

(Testimony of David O. Church.)

ing Kettleson, that he has made efforts to find him, and has not been able to find him, and also the reason that he would not put Oden on the stand is, that his testimony would be different from what he gave before the Inspectors, and he does not believe he would be a trustworthy witness.

Mr. HENGSTLER.—He gave his testimony so differently on two occasions before the Inspectors that we cannot trust him.

Mr. DENMAN.—I desire to deny, if your Honor please, that [51] the witness Oden gave facts before the Inspectors on different occasions so that he is shown to be an untrustworthy witness, but the facts he did give before the Inspectors which led to the loss of his license—

The COURT.—Have you the testimony that was given before the Inspectors?

Mr. DENMAN.—I do not know whether it is a correct copy or not. It may be or not.

The COURT.—The shortest way would be to introduce it for the purpose of showing that.

Mr. DENMAN.—I do not care to introduce that great mass of testimony. I have a right to make a statement, if my opponent does. It is in the record.

Mr. HENGSTLER.—Introduce it, if you can prove it.

Mr. DENMAN.—Let me finish my statement. In my opinion, the reason why the testimony is not introduced is because it would contradict the allegations of the answer to the libel in the case of the Globe Navigation Company against the “Ada War-

(Testimony of David O. Church.)

ren," and would show that the verification of that was made under circumstances that perhaps would warrant so definite a verification to be made. I would like to examine the witness.

Mr. HENGSTLER.—I will state our information with regard to that part of the answer which is struck out was derived from that matter—

The COURT.—Are you through with this witness?

Mr. HENGSTLER.—I am.

The COURT.—(Addressing Mr. Denman.) He has given no testimony at all. If you desire to call him, and it helps to prove your case, you can put him on the stand. (Addressing Mr. Hengstler.) Call your next witness.

Mr. DENMAN.—I am not through. [52]

The COURT.—You cannot cross-examine this witness.

Mr. DENMAN.—I do not intend to cross-examine him, but to ask him a direct question.

The COURT.—You can do so when you get to your case.

Mr. DENMAN.—Very well. I thought Mr. Hengstler's case was submitted.

Mr. HENGSTLER.—I thought it was admitted as a fact that we had made the efforts to find this man. If it is not admitted, I will prove it.

Mr. DENMAN.—We prefer to have you prove that.

The COURT.—Ordinarily, when a respectable attorney makes a statement before me that he has

(Testimony of David O. Church.)

endeavored to get a witness I usually take his word for it. I do not think that in my experience as a judge I have ever been called on to try an attorney in such a way as that.

Mr. DENMAN.—The attorney said he had not made any efforts himself but through his clients. I am not questioning Mr. Hengstler at all. I am trying to find out what efforts were made.

Mr. HENGSTLER.—I am very much gratified at what your Honor stated. I expected myself that my word would be taken.

Mr. DENMAN.—Your word is taken for your own investigation. You put the word of your clients on the record. I desire to investigate them.

Mr. HENGSTLER.—I have known during the last few days the anxiety of the other side to have this particular witness here. That is one of the circumstances which determined me in not calling him.

Mr. DENMAN.—That is true.

The COURT.—Are you through with your case?

Mr. HENGSTLER.—Mr. Denman calls on me to prove the fact that [53] we made inquiry with reference to the whereabouts of this man. You insist upon that, do you, Mr. Denman.

Mr. DENMAN.—Yes.

Mr. HENGSTLER.—Q. Mr. Church, what is your position in relation to—

The COURT.—(Intg.) I do not think it makes any difference to me whether he made any effort to get him or not. You can take up the time of the Court in proving it if you like. I do not think it will

(Testimony of David O. Church.)

make any difference to me. I think I shall decide the case on the evidence that is produced before me.

Mr. HENGSTLER.—I do not like to take up the time of the Court and that is the reason I withdrew the witness.

Mr. DENMAN.—I understand the statement is withdrawn.

Mr. HENGSTLER.—I have made my statement.

Mr. DENMAN.—I should like it to appear on the record that I am not questioning Mr. Hengstler's word. I will make my statement, what I do think is this—

The COURT.—You can prove anything you like when you come to your case. If you want to show that the witness here knows all about it, and that they have not made any effort to get him, you can prove it if you like, if you think it has any bearing on the case.

Mr. DENMAN.—Let it appear of record that I am not questioning Mr. Hengstler's word, or desire to suggest in the slightest way that he has been guilty of impropriety in the case.

The COURT.—Proceed with your evidence.

Mr. HENGSTLER.—I submit the case.

Cross-examination.

Mr. DENMAN.—Q. Mr. Church, what efforts have you made to find the witness Kettleson?

A. I employed a man to go about the waterfront, a seafaring man, who could probably better locate him [54] than any other man I could think of.

Q. How long ago was that?

(Testimony of David O. Church.)

A. That was, I should judge, 10 or 12 days ago.

Q. Did you not make any attempt before that to get him?

A. I did myself. I asked different men in the business as I was about the waterfront, but I found I could not succeed in that way.

Q. When was it you made your first inquiries?

A. Myself?

Q. Yes.

A. I think in the neighborhood of a week previous to that time that I got this man.

Q. Have you ever seen Kettleson between the time of the hearing before the Inspectors and the time that you looked for him, this week before, when you made your own investigation? A. No, sir.

Q. Did you ever look for him before that time?

A. No, sir.

Q. Made no attempt to get him during that period? A. No, sir.

Q. What is his business? A. A sailor.

Q. Liable to be in and out of the port?

A. Yes, sir.

Q. Going on voyages elsewhere? A. Yes, sir.

Q. What is your relation to the corporation?

A. I am the secretary of the company.

Q. Secretary to the corporation? A. Yes, sir.

Q. Are you manager also?

A. I would not consider myself manager, no.

Q. Who is the manager of the corporation?

A. Our corporation is composed of three men. We each of us try to help the other one manage the business.

(Testimony of David O. Church.)

Q. You had charge of this particular matter of looking up Kettleson?

A. Yes, sir, I was supposed to look him up.

Q. You do not know anyone else in the corporation who took charge of it? A. No, sir.

Q. The same is true of the witness Oden, is it not? You did not make any attempt to find Oden until about three weeks ago? [55]

A. A day or so before this case was first set for trial. I think it was two days before the case was set for trial that I knew it was coming up.

Q. Had you seen Oden at any time since he was disrated or suspended for the injuries occurring as the result of this collision? A. Yes, sir.

Q. You did see him after that time?

A. Yes, sir.

Q. Did you talk the case over with him then?

A. I did.

Q. Did you tell him then you would need him as a witness?

A. I told him most likely we would want him as a witness, I presume. I do not remember what I said to him, now, in conversation.

Q. At that time, after he had been disrated, you intended to use him as a witness?

A. At that time I wanted him to appeal the case.

Q. He did not appeal it?

A. He refused to appeal it, apparently.

Q. Do you know what business he has been in in the past year? A. I don't know.

Q. Do you know whether he has ever been back

(Testimony of David O. Church.)

to piloting again? A. I don't know.

Q. Did you make any inquiry among the pilot people? A. As to what he was doing?

Q. Yes.

A. I did not make any inquiry about the man.

Mr. HENGSTLER.—Mr. Denman consents that this judgment of the Inspectors go in evidence, because he has brought out the fact that this man was disrated. I would like to offer this in evidence for what it is worth, as Libelant's Exhibit "D." [56]

[Testimony of Dick Miller, for Libelant (in Rebuttal).]

DICK MILLER, called for the libelant in rebuttal, sworn.

Mr. DENMAN.—Q. Mr. Miller, what is your trade? A. A sailor.

Q. How long have you been a sailor?

A. I have been sailing about 25 years in deep water. Then I have been sailing about 10 years here on this coast.

Q. In the bay or on the coast?

A. On a steamer, in a small vessel.

Q. Have you ever sailed on small vessels in and out of the Carquinez Straits?

A. Yes, sir, on the coast and outside ports.

Q. Have you ever sailed on small vessels in Carquinez Straits?

A. Yes, sir, I have been in scow schooners years ago, the first year that I came out here; in 1880, or 1881, and 1882, I have been sailing on the bay.

(Testimony of Dick Miller.)

Q. Were you ever employed by the Atlas Rock Company?

A. Yes, sir, I was employed there twice.

Q. Did you ever take a voyage on a barge towed by the "Ada Warren" to Ryer Island, in the river?

A. Yes, sir, I went up with the barge. I went up to the derrick barge; I wanted to go there on board and work for \$45.

Q. Did you have any duty to perform on the barge or tug on that trip, or were you a passenger?

A. I was a passenger.

Q. Do you remember entering Carquinez Straits?

A. I know the Straits a little bit from Port Costa at night time.

Q. On this voyage in question, when you were coming up Carquinez Straits on the tug and barge, what side of the channel did you take?

A. We took on the port side of the channel.

Q. Do you mean the port side of your vessel?

A. The towboat was on the port side of the barge.

Q. Which side of the channel did you go up?

A. The port side. [57]

Q. Is that the northerly or the southerly side?

A. I cannot say that.

The COURT.—Where was he going? Was he coming out of the Golden Gate, or going up the other way.

Mr. DENMAN.—Upon this voyage in question he was coming up the channel, going up to Ryer Island.

The COURT.—That is, going from San Francisco to Ryer Island.

(Testimony of Dick Miller.)

Mr. DENMAN.—The departure was from McNear's.

The COURT.—To Ryer Island. That is somewhere on the Sacramento River, is it not?

Mr. DENMAN.—Yes.

The COURT.—That is going up?

The WITNESS.—Yes.

Mr. DENMAN.—Do you remember passing Mare Island light?

A. I did not look for anything at all, not that night. I was on board of the tow at the time we went up there. Five minutes before the engineer told me to get a cup of coffee, and I said "All right."

Q. Did you, going up the stream, at any time see a steamer coming down the stream? A. Yes, sir.

Q. Was that the steamer that run into you?

A. Yes, sir; it was this way—

Q. One moment. Whereabouts was the steamer with reference to the channel; not with reference to your vessel, but with reference to the channel of the Carquinez Straits, when you saw her?

A. I was in the towboat, and I went over to the barge, over here. The towboat blew one whistle. I stepped on the lower boxes and looked over the boxes.

Q. Was it necessary for you to look over the boxes?

A. Yes, sir, certainly; I could not see. I had to step over so that I could see what was going on.

Q. On which side of the boxes were you?

A. Right amidships. [58]

(Testimony of Dick Miller.)

Q. On the port side?

A. I was right in amidships of the barge, and stepped on the boxes and looked right ahead.

Q. Were you standing on the port or starboard side of the barge?

A. I was standing right in the middle of the barge.

Q. On the port or starboard side?

A. Right in the middle of the barge.

Q. In which direction did you look to see the steamer, port or starboard?

A. Starboard bow. I could see the steamer about half a point from the bow. When I was on this lookout I sang out: "She is about half a point on the starboard bow."

Q. This was just after you heard this one whistle?

A. Yes, sir; that is all I noticed, one whistle that they blew. I came down again, and think everything was all right, and I took a tumble to myself that there might be a mistake, and I went outside the boxes on the barge on the starboard side and I looked to see where the steamer was, and there came the steamer right across the channel—that big steamer. It came right across. I think I says, "He run into us." I jumped on board of the tow and it throwed me down on deck.

Q. From the force of the collision?

A. Yes, sir; it throwed me right down on deck when the towboat was going.

Q. After the time that you heard the one whistle did you see anything that went on in the pilothouse of the tugboat?

(Testimony of Dick Miller.)

A. No, sir, I can say nothing from that.

Q. What direction was the course of the steamer changed, the steamer that was approaching you? From what direction to what direction?

A. He changed to the east. Here is east and here is west (illustrating). No, here is west and this is east.

Q. In one moment. In what direction, considering the starboard and port side of the steamer, did she turn to her starboard or port side?

A. She turned to her starboard side. [59]

Q. After that the collision occurred?

A. Yes, sir.

Q. What point of the barge was hit?

A. Just on the corner of the barge.

Q. Starboard or port corner?

A. The starboard corner. The big steamer went across us. I was standing outside of the barge and I expected to see the barge go right through.

Q. Let me ask you: When you saw the vessel approaching on your starboard bow, if you had continued on the course you were on, would you have cleared her? If the tug and tow had continued on the course you were on when you saw the vessel on the starboard bow would you have cleared her?

Mr. HENGSTLER.—I object to that question.

The COURT.—Let him answer.

A. Yes, sir, I believe it. He was blowing no whistle—he blew one whistle and the big steamer changed his course and went across us. The barge did not change its course at all. I cannot say that—

(Testimony of Dick Miller.)

nothing about that. The big steamer changed and came across.

Mr. DENMAN.—Q. As I understand it, at the time that you saw the big steamer coming down the channel the vessels would have cleared if you had kept on your courses? A. Yes, sir.

Q. Was that because the steamer was sufficiently on your starboard bow to clear you?

A. If our towboat only blew two whistles, he would have been all right. The tug only blew one whistle, and that was the cause of the accident; the big steamer run into us. I told that to the captain of the tugboat right there. He wanted to know my name. I said, "Captain, you only blew one whistle, and you might as well leave me out altogether."

Q. That was Captain Oden, the pilot?

A. I don't know the name.

Q. Was that the pilot?

A. I know he was the pilot—that is [60] what I fancy; he came off the boat in the morning.

Q. Did you ever have any conversation with Captain Oden, the pilot, regarding giving your testimony?

A. No, sir, not with the pilot or the captain, either. I did not say anything to any people at all.

Q. You do not mean to say you have not talked this case over with others?

A. Only with you, and some other persons in the Rock Company.

Cross-examination.

Mr. HENGSTLER.—Q. Right after the collision

(Testimony of Dick Miller.)

did you speak to this gentleman here (pointing to Captain Hammer)? Do you remember him?

A. No, sir.

Q. You do not remember that you had a conversation with him?

A. That might be. I don't know him.

Q. Did you not tell the captain right after the collision that the "Meteor" was at fault in bringing about the collision—that the "Meteor" ran into your tug and barge?

Mr. DENMAN.—There are two questions there; distinguish them. One whistle is port and two is starboard.

Mr. HENGSTLER.—Q. Did you have such a conversation with Captain Hammer? Did you tell him that the "Meteor" ran into your barge and tug?

A. No, sir, I don't know the man. I might have seen him; I don't know him.

Q. Did you not say it was their fault at that time, the fault of the "Meteor" that the collision happened? A. No, sir.

Q. Right after the collision?

A. I was on board and came down in the tow-boat alongside of the steamer. I talked to no one on board. I said no more to these fellows. I said to the captain, "Leave me out; you only blew one whistle." He put my name down. That is all I told him.

Mr. DENMAN.—Q. The captain put your name down? A. Yes, sir, he put my name down. [61]

Mr. HENGSTLER.—Q. Are you prepared to say

(Testimony of Dick Miller.)

that you had no conversation with the captain in which you stated that the "Meteor" was at fault?

A. No, sir, I had not. I never been over to the city. This is the first time in a year that I have been over here. I have always been in Oakland.

Q. No, I mean on board of the tug. A. No, sir.

Q. Did you have any conversation with the captain of the "Ada Warren"? A. No, sir.

Q. No conversation with him at all? A. No, sir.

Q. Did you have any conversation with anybody on board of the "Ada Warren"?

A. No conversation with anybody.

Q. Right after the collision? A. No, sir.

Q. Never told anyone anything about your opinion?

A. Only I told the captain, when he put my name down.

The COURT.—He says he told the captain to leave him out, because, he says, "You only blew one whistle." That is all the conversation he says he had with anybody.

A. That is all I told him, and no more.

Mr. HENGSTLER.—Q. When did you first mention this occurrence to anyone after the collision?

A. I don't understand what you mean.

Q. When did you first speak about this to anyone after the collision?

A. I spoke to no one except this gentleman (pointing to Mr. Denman.)

Q. When did you speak to Mr. Denman about it?

A. About three weeks or a month ago.

(Testimony of Dick Miller.)

Q. Where did you have that conversation with Mr. Denman?

A. He came over to my house where I roomed.

Q. Did not the Atlas Rock people ask you to say that the "Meteor" was at fault?

A. No, sir, they did not.

Q. No one told you that?

A. No, sir. I had to go to the office [62] to get my money, and I quit the job altogether.

Redirect Examination.

Mr. DENMAN.—Q. Where did that barge finally land up, on the starboard or port side of the channel going up? A. Going up it was on the port side.

Q. The barge finally landed on the port side?

A. We went up on the port side; the big steamer was on the starboard side coming down.

Q. When you say that the big steamer was on the starboard side, do you mean on the starboard side of your vessel? A. Yes, sir.

Q. Where was the big steamer with reference to the channel.

A. It goes about in the middle of the channel.

Q. After the barge broke away and the current carried you on upstream, did the barge touch on either side of the channel? Where was she finally anchored?

A. She was anchored in deep water on the Vallejo side.

Q. On the Vallejo side of the channel?

A. Yes, sir.

Q. That is to say, on the port side of the channel going up?

(Testimony of Dick Miller.)

A. On the port side of the channel going up.

Q. How far was that from the place where the accident occurred?

A. I cannot say just exactly; I did not take no notice.

Q. Was it half a mile?

A. I know it was Port Costa, and there were hills on the Vallejo side.

Q. Do you know whether it was Port Costa or Vallejo Junction? Could you tell the difference between the two?

A. No, sir, not that night; it was dark.

Q. You testified that she was anchored on the port side of the channel going up.

A. They anchored the barge right on the rocks.

Q. On which side of the channel? On the port side? A. The port side going up. [63]

Q. That is to say, on the left-hand side of the channel going up? A. Yes, sir,

Mr. HENGSTLER.—Q. Have you ever been in charge of the navigation of any vessel in your life?

A. No, sir.

Mr. DENMAN.—Q. Have you ever taken a wheel?

A. Yes, sir, I have been before the mast, certainly.

Q. Quartermaster?

A. Yes, sir; I have been steering by degree.

Mr. HENGSTLER.—Q. In a steamer?

A. Yes, sir.

Q. How long ago?

A. That is about 10 years ago.

Mr. DENMAN.—That is our case.

(Testimony of Dick Miller.)

Mr. HENGSTLER.—I want to recall Captain Hammer.

Mr. DENMAN.—I object. He has not been sequestered. I told you I should probably call Captain Hammer again and ask his sequestration. The man was here and heard the entire testimony.

The COURT.—I understand; put him on the stand.

Mr. DENMAN.—I object.

[Testimony of Robert W. Hammer, for Cross-libelant and Respondent (Recalled).]

ROBERT W. HAMMER, recalled for cross-libelant and respondent.

Mr. HENGSTLER.—Q. You saw this man who just testified, Dick Miller? A. Yes, sir.

Q. You heard what he said? A. Yes, sir.

Mr. DENMAN.—I object again to his testifying. He says he heard what he said, when he was ordered to be sequestered.

The COURT.—I judge from the trend of the questions asked by Mr. Hengstler that the purpose he puts him on the stand for is to have him testify that the witness did say to him what he denied saying. He is not going over the case again. It is simply to prove that conversation.

Mr. DENMAN.—I am not in a position to say: "Did you ever [64] have a conversation with Dick Miller?" He has heard the whole thing.

The COURT.—What earthly difference does it make? Supposing he stood outside.

(Testimony of Robert W. Hammer.)

Mr. DENMAN.—What is the object of sequestration?

The COURT.—That is purely a matter of discretion of the Court. The object, as I understood, that you wanted it for was that one witness should not hear another detail the circumstances of this collision.

Mr. DENMAN.—Should not hear any of it.

The COURT.—When a witness is put on the stand and is asked the *direction* question, “Did you say to John Doe a certain thing,” you can have him come on the stand and dispute it. Ask him that one question. That is the only thing. Nothing else is in rebuttal.

Mr. HENGSTLER.—Q. Did you have a conversation with this Dick Miller right after the collision on board of the “Ada Warren,” Captain Hammer?

A. Yes, sir.

Q. What did he say upon that occasion to you?

The COURT.—Ask him the direct question that you asked Mr. Miller, whether he said so and so to this man, and he denied it. Ask him what he did. Ask him the direct question.

Mr. HENGSTLER.—Q. Did Dick Miller at the time, right after the collision between the “Ada Warren” and the “Meteor,” tell you, Captain, that in his opinion the “Meteor” was at fault in bringing about the collision? A. He did.

Q. You are positive of that?

A. I am positive of it.

Q. You recognize the man, you are sure he is the man? A. Yes, sir.

(Testimony of Robert W. Hammer.)

Cross-examination.

Mr. DENMAN.—Q. Is it not true that Miller was on the barge at the time she went up the stream?

A. That he was on the barge [65] at the time?

Q. Yes.

A. He was not on the barge at the time. When the “Meteor” was getting the line on me he fell overboard over the tug.

Q. Do you mean to say he was not on the barge at the time it floated up the stream?

A. He was not on the barge, on the tug. The “Meteor’s” own men will tell you that when we got the line on the “Meteor” he got mixed up with the line and it threw him overboard.

Q. Did you go aboard the “Meteor” yourself?

A. I did.

Q. How soon after the collision?

A. About 10 minutes; after I blew my distress signals.

Q. Who stayed in charge of the tug?

A. The pilot Oden. We had a line on the “Meteor” at the time.

Q. Where was Miller at that time?

A. On the tug.

Mr. HENGSTLER.—That is all.

Testimony closed.

[Endorsed]: Filed Febry. 20, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Deposition of T. D. McFarland, for Libelant, in Case No. 13,602, Globe Nav. Co. v. Tug "Ada Warren."]

In the District Court of the United States, in and for the Northern District of California.

THE GLOBE NAVIGATION COMPANY, LIMITED,

Libelant,

vs.

Tug "ADA WARREN," etc.,

Respondent.

BE IT REMEMBERED, that on Wednesday, the 6th day of February, 1907, pursuant to the within stipulation, at the offices of Messrs. Smith & Pringle, 504 California street, in the City and County of San Francisco, State of California, personally appeared before me, Frank L. Owen, a Notary Public in and for the City and County of San Francisco, State of California, duly commissioned and authorized to administer oaths etc., etc., T. D. McFARLAND, a witness produced in behalf of the libelant in the above-entitled matter.

Messrs. WILLIAM DENMAN and JAMES R. PRINGLE appeared as proctors for the Libelant, and LOUIS T. HENGSTLER, Esq., appeared as proctor for the Respondent.

And the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, did thereupon depose and say as is hereinafter duly set forth. [67]

(It is stipulated and agreed by and between the proctors for the respective parties hereto that the deposition of T. D. McFarland may be taken *de bene esse* before Frank L. Owen, Esq., a Notary Public in and for the City and County of San Francisco, State of California, and that the same may hereafter be read in evidence by either party, and that all objections to the form of the questions and answers and responsiveness of the answers are hereby waived, and all other objections being reserved,

It is further stipulated that the said deposition may be taken down in shorthand by Erwin M. Cooper and after having been transcribed by him that the reading over of the testimony to the witness and the signing thereof are hereby expressly waived.)

[Deposition of T. D. McFarland, for Libellant.]

Mr. DENMAN.—Q. Capt. McFarland, how long have you been at sea? A. About 17 years.

Q. In what capacity?

A. Everything from a sailor to a Master.

Q. Have you ever been a pilot? A. I have.

Q. For how long?

A. About four years and a half.

Q. In what waters?

A. Alaska and Puget Sound; from Puget Sound to Alaska.

Q. That is, in and out of Puget Sound and to Alaska? A. Yes, sir.

Q. On large vessels?

A. Well, the largest one I was on was 2300 tons.

Q. You took the vessels that came to you in the

(Deposition of T. D. McFarland.)

course of your pilotage? A. Yes, sir.

Q. Of various tonnages?

A. Yes, sir.

Q. Captain, are you familiar with the channel from San Pablo Bay up the Carquinez Straits toward Suisun Bay, the San Pablo Bay through [68] the Carquinez Straits up to Suisun Bay?

A. Up as far as Port Costa.

Q. You have sailed in and out of there several times? A. Several times, yes, sir.

Q. And are familiar with the waters and general conditions surrounding navigation in those places?

A. Yes, sir.

Mr. HENGSTLER.—I do not object very much to leading questions, but I would prefer that you ask him a little bit differently, and I suggest that the questions be not put in such a leading form.

Mr. DENMAN.—Q. On or about the 11th day of October, 1906, Captain, were you on the steamship "Meteor"? A. Yes, sir.

Q. In what capacity? A. Master.

Q. Where were you in the early morning of that day?

A. I left Port Costa bunkers about 4 o'clock.

Q. Where are the Port Costa bunkers?

A. They are a little below the Southern Pacific Ferry slip at Port Costa.

Q. Where is Port Costa with reference to the waters of the bay; is Port Costa on Carquinez Straits? A. Yes, sir.

Q. And which side of those Straits?

(Deposition of T. D. McFarland.)

A. On the right-hand side going up.

Q. What side is that by the compass?

A. Starboard side.

Q. And by the compass, the general direction?

A. On the east side—west side.

Q. On the east or west side? A. West side.

Q. Northwest or southwest side of the Straits?

A. Southwest.

Q. Southwest side of the Straits. And you say that you left the bunkers at about 4 o'clock in the morning. Where did you go then?

A. I was on my way to Point Richmond.

Q. What course did you take with reference to the stream? A. Southerly course.

Q. Did you steer across the stream from the bunkers? [69]

A. Not until I had left the bunkers some little time.

Q. And how far had you then proceeded?

A. About a half a mile.

Q. How far across the stream were you at that time?

A. About mid-channel.

Q. And what was your course then, still across the stream or down the stream?

A. Down the stream.

Q. Did you again head your course towards the north shore?

A. From there I held the starboard shore down.

Q. By that you mean what?

A. On my starboard hand.

Q. How far were you from the starboard shore dur-

(Deposition of T. D. McFarland.)

ing the remainder of your trip?

A. A quarter of a mile—about that.

Q. Where were you standing during this period?

Mr. HENGSTLER.—What period?

Mr. DENMAN.—That we have been describing.

Mr. HENGSTLER.—From the time he left the bunkers?

Mr. DENMAN.—Yes. A. On the bridge.

Q. Were you on the bridge during that entire period? A. Yes, sir.

Q. Who was there with you?

A. The second officer and the quartermaster.

Q. Did you at any time during this period see the lights of the tug “Ada Warren”? A. Yes, sir.

Q. In what direction, with reference to the stream?

A. They were on my port bow.

Q. How much on your port bow?

A. About a point and a half.

Q. What was the condition of the night?

A. Clear.

Q. And the tide? A. Flood.

Q. Are you familiar with the course the tide takes in flooding there, with reference to the channel?

A. Practically, yes.

Q. About how does the tide set? [70]

A. Up the stream, up the straits.

Q. Was there any wind at this time, Captain?

A. Very little.

Q. Enough to make the water at all rough?

A. No.

(Deposition of T. D. McFarland.)

Q. What was the condition of the water?

A. Smooth.

A. You say you saw the tug "Ada Warren" a point and a half off your port bow. About what distance was she from you at that time, as near as you could judge?

A. At the time I picked up the lights?

Q. Yes. A. I should say about three miles.

Q. Could you be certain of the distance in the condition of the night, or is that an approximate statement? A. Approximate.

Q. What light did you see on the "Warren"?

A. First I saw one mast-head light.

Q. What was the next light you saw?

A. Afterwards with the glass I picked up the second mast-head light and the green light.

Q. In what direction was the green light proceeding as you watched it?

A. Across the bay—the straits.

Q. And as far as you could tell in the condition of the night, what course was the "Warren" pursuing?

A. Well, I couldn't tell, the way the lights were shining, whether he was going right straight across the straits or coming at an angle.

Q. Is there any port on the starboard side of the stream from your vessel, towards which the "Warren" might have been making at that time?

A. Yes, sir. There is Vallejo and South Vallejo.

Q. Could you tell, from the direction in which the green light seemed to be traveling, whether or

(Deposition of T. D. McFarland.)

not that vessel was making for South Vallejo?

A. I don't understand the question. [71]

Q. I say, could you tell from the direction the green light was going, whether or not the "Warren" was making for South Vallejo? A. No, sir.

Q. What is your opinion in that regard?

A. My opinion is that she was.

Q. Did the green light of the "Warren" at any time cross your bows? A. Yes, sir.

Q. At about what distance from you?

A. About a thousand feet.

Q. Had you at any time changed your rates of travel, prior to her crossing your bows?

A. No, sir.

Q. You kept your course and kept your rate, your speed, up to that time? A. Yes, sir.

Q. What happened after the "Warren" crossed your bows?

A. She immediately showed both red and green lights and blew one whistle.

Q. What is the significance of showing both red and green lights, with reference to the approach of the other vessel towards you?

Mr. HENGSTLER.—That is a question of law. The rules say what the significance is. Still, I do not care if he has got a different view from the rules, I am perfectly willing that he should finish.

A. I would say that the vessel was coming right end on.

Mr. DENMAN.—Q. How many whistles did you say were blown by the "Warren" at this time?

(Deposition of T. D. McFarland.)

A. One.

Q. What did you do?

A. I answered with one, and immediately blew three whistles; put the wheel hard aport and started astern full speed.

Q. What is the tonnage of your vessel, Captain, at this time? A. 2300.

Q. And how was she laden? A. With ore.

Q. Did she have any momentum on at the time you gave those whistles?

A. She was going full speed ahead. [72]

Q. And making about how many knots?

A. About eight.

Q. Why did you give the signal, three whistles, at this time?

A. Showing that I was backing full speed.

Q. And why were you backing full speed?

A. Trying to avoid a collision.

Q. What other signals—or did the “Warren” give any other signals after the one whistle?

A. None that I heard.

Q. Did the vessels collide? A. Yes, sir.

Q. Where were you struck?

A. On the port bow.

Q. Was the tug at this time engaged in towing?

A. Yes, sir.

Q. What was she towing?

A. Rock scow, or a scow loaded with rock.

Q. How was she towing that, was she lashed to the scow or on a hawser?

A. She was lashed to the scow.

(Deposition of T. D. McFarland.)

Q. Whereabouts?

A. She had the scow on her southard side.

Q. She was on the port quarter, then, of the scow?

A. The port quarter of the scow.

Q. And where did the scow strike you?

A. On our port bow.

Q. How far aft? A. About 35 feet.

Q. Were you at any time struck by the tug?

A. Yes, sir.

Q. Whereabouts?

A. Forward of where the scow struck us.

Q. How do you account for that, Captain?

A. The minute the scow struck, the tug parted her lines.

Q. And what did she do then?

A. She run into us.

Q. Captain, what is the height of your bridge from the water's edge? A. At that time, about 35 feet.

Q. Was the tug alongside so that you could see the height of her pilot-house? A. Yes, sir.

Mr. HENGSTLER.—Q. You are speaking now of the collision itself, when the collision itself happened, and when the two were [73] together?

A. Yes, sir.

Mr. DENMAN.—Q. How much was her pilot-house above the water's edge, about?

A. About 15 feet.

Q. Captain, at the time that the collision occurred, whereabouts were you in the channel, with reference to your starboard shore?

A. I was about a third of the way from the star-

(Deposition of T. D. McFarland.)

board shore, a third of the way across the channel.

Q. From the position that you had on the bridge, could you see plainly in both directions?

A. Yes, sir.

Q. Across the channel? A. Yes, sir.

Q. And at a height of thirty feet, could you make competent judgment as to distance between the two shores? A. Yes, sir.

Q. Which way did the vessel swing when she was struck? A. Her nose swung to starboard.

Q. How far round, with reference to the channel?

A. At the time of the collision we were practically heading right across the channel.

Q. That is to say, immediately after the collision, you were headed practically toward the starboard shore? A. Yes, sir.

Q. Which direction did you turn from there?

A. I turned to the right.

Q. You turned to the starboard, that is?

A. Yes, sir.

Q. Did you make your turn clean, or did you have to back and fill? A. Backed and filled.

Q. What was the reason for that?

A. I was too close to the starboard shore—she would not swing around.

Q. What direction did you sail in then?

A. I turned right around and came down and picked up the tug.

Q. You made a complete circle? A. Yes, sir.

[74]

Q. How near did you sail to the starboard shore in making that circle?

(Deposition of T. D. McFarland.)

A. Possibly an eighth of a mile.

Q. Captain, where did you go then?

A. I made the tug fast alongside, and then went off into the middle of the channel, and dropped my anchor.

Q. And you towed the tug with you, you say, to the middle of the channel, where you dropped your anchor? A. Yes, sir.

Q. How far did you have to tow the tug before you got there? A. Only a short distance.

Q. How many feet would you say?

A. Possibly a quarter of a mile.

Q. To the middle of the channel? A. Yes, sir.

Q. And there you anchored? A. Yes, sir.

Q. Did you take careful observation as to where you were anchored; did you look at both shores to determine where you were located?

A. No, I did not.

Q. How do you know it was in the middle of the channel?

A. It was practically in the middle of the channel.

Q. As near as you could determine from the bridge, that is; is that it? A. Yes, sir.

Mr. HENGSTLER.—May I ask a question here?

Mr. DENMAN.—Yes.

Mr. HENGSTLER.—Q. By “middle of the channel,” do you mean half the distance between the shores? A. Yes, sir.

Mr. DENMAN.—Q. Captain, how many feet of water was your vessel drawing? A. 18 foot 6.

Q. How large was the barge that you collided with; did you have a fair look at it to determine?

(Deposition of T. D. McFarland.)

A. That I couldn't say.

Q. Did you make any attempt to save the barge?
[75]

A. After taking the "Warren" alongside, I asked the Master if she was leaking and he said, "No." I told him to anchor his tug and then I would go and pick up the barge for him. He said that he couldn't, that his tug had no anchors. I said, "I can't handle both of you at the same time. I will go and drop my anchor and give you the assistance of two men to go and anchor your barge," which he done.

Q. Did you see the barge anchor? A. No, sir.

Q. Captain, was there anything left undone on the part of your vessel or yourself at the time of the collision, to avoid a collision.

Mr. HENGSTLER.—I object to that question on the ground that it is a question of law, and can be determined from all the facts that have been testified to by the Captain.

A. No, sir.

Mr. DENMAN.—Q. What was the name of the quarter-master that was on the bridge with you?

A. Johnson—Harry Johnson.

Q. What nationality was he?

A. I couldn't say whether he was a Norwegian or a Swede.

Q. Might his name have been Johannsen?

A. That I couldn't say, but I wrote his name in the payroll several times, and wrote it as the mate had given it to me, as Johnson.

Q. But he was a man of Scandinavian accents, as

(Deposition of T. D. McFarland.)

far as his language would show you? A. Yes, sir.

Q. Captain, I understand that you are awaiting the command of a steamer? A. Yes, sir.

Q. What vessel is that?

A. She is not named yet.

Q. She is being built? A. Yes, sir.

Q. And you expect to go to sea on her?

A. Yes, sir.

Q. Are you going to sea before that time? Where is your [76] home, Captain?

A. Everett, Washington. I couldn't say when I am going to sea. If I get up on the Sound, and should have time to make a trip to Alaska as pilot, I shall take the trip.

Q. You expect to return to the Sound?

A. Yes, sir.

Q. How soon? A. On Monday.

Q. And by "Sound" you mean Puget Sound?

A. Yes, sir.

Q. There is one more question, Captain: When you backed your vessel full speed astern, which way did she swing, if at all?

A. She swings her stern to port and her bow to starboard.

Q. As I understand it, the signal of the "Ada Warren" was one whistle? A. Yes, sir.

Q. And you answered that with one whistle?

A. Yes, sir.

Q. What do you understand to be the purpose of that one whistle?

A. To leave each other on the port side.

(Deposition of T. D. McFarland.)

Q. And now I understand you to say that putting her at full speed astern threw her bow to the starboard? A. Yes, sir.

Q. And was her bow thrown to starboard in this case? A. Yes, sir.

Q. And you say the "Ada Warren" struck you on the starboard or port side? A. The port bow.

Q. On the port bow. Captain, suppose the "Ada Warren" had continued on her course, without changing it, after she had crossed your bow, would you have cleared her on the course you were then sailing? A. Yes, I think we would.

Q. How would you have cleared her, astern or how?

A. We would have gone astern of the scow.

Q. What, then would you say was the cause of the collision?

Mr. HENGSTLER.—I object to that for the reason that that is a question of law, to be determined from the facts as they have been given by the Captain, and by the other testimony in the case. [77]

A. I think if he had never blown the one whistle and proceeded on the same course she was on, that we would have avoided a collision.

Mr. DENMAN.—Q. What do you mean by "she," the "Ada Warren"?

A. The tug; yes, sir.

Q. How far after the stern of the scow, if at all, did the tug project? A. That I couldn't say.

Q. Did it project?

A. That I couldn't say. But knowing that they

(Deposition of T. D. McFarland.)

almost always pull scows that way, because it is so much easier to steer them—

Mr. HENGSTLER.—Q. But you do not know?

A. I don't know.

Mr. DENMAN.—Q. When you said that if the tug had proceeded on her course you would have cleared the scow, did you mean by that that you would have cleared the tug and scow together?

A. Yes, sir, both.

Q. Then, as I understand your testimony, you mean to say that as you saw these two in the stream, they appeared, as far as you could see in the dark, as one body, and you could have passed that body, whatever it was, if it had continued on its course?

A. Yes, sir.

Q. But as I understand it, in the condition of the night, you could not tell whether the tug projected or did not project behind the scow? A. No, sir.

Cross-examination.

Mr. HENGSTLER.—Q. Captain McFarland, who acted as pilot on the occasion that you spoke of, on the "Meteor"? A. I did myself.

Q. You say you are familiar with Carquinez Straits? A. Yes, sir.

Q. Had you ever taken the "Meteor" up there before? [78] A. Yes, sir.

Q. On a previous occasion? A. Yes, sir.

Q. As pilot? A. Master of her, yes, sir.

Q. Did you ever go through the Straits either way as Master, when you had a bay pilot on board?

A. I did when there was a man with a license, a

(Deposition of T. D. McFarland.)

licensed pilot there.

Q. On this particular occasion there was no licensed pilot on board of her, was there?

A. No, sir.

Q. You yourself have not any license, have you, Captain?

A. I have not any pilot's license for that bay.

Q. You knew that the law required a pilot, did you not?

Mr. DENMAN.—I object to the question as irrelevant, immaterial and incompetent.

A. I do.

Mr. HENGSTLER.—Q. You, however, piloted her on this occasion, knowing that it was unlawful, did you not, Captain?

Mr. DENMAN.—I object to the question on the ground that it is entirely irrelevant whether or not the Captain had or had not a license, the sole question at issue here being whether or not the Captain acted in a skillful and seamanlike manner in handling his vessel, whether he did or did not have a license.

Mr. HENGTLER.—I did not ask him that. I asked him whether he knew. Let me finish that question.

Q. I ask you whether you know it was unlawful to navigate in those waters without a licensed bay pilot?

Mr. DENMAN.—I make the same objection.

A. I do.

Mr. HENGSTLER.—Q. What was your imme-

(Deposition of T. D. McFarland.)

diate destination on that morning—Point Richmond?

A. Point Richmond.

Q. You were going to take freight, were you, at Point Richmond? A. Yes, sir. [79]

Q. I understand, Captain, that you testified that you did not know at the time whether the “Warren” was going over to South Vallejo, but your impression was that she was going across the channel to South Vallejo. Is that correct? A. Yes, sir.

Q. And that opinion it was which you acted upon in navigating your vessel, was it? A. No, sir.

Q. You thought she was going across, did you not? A. Yes, sir.

Q. Did you take that into consideration, in steering the course and in navigating your own vessel?

A. I had not changed the course at all.

Q. In not changing the course, is it not the reason for not changing the course, your opinion that the “Warren” was going over to South Vallejo?

A. No, sir; my course would take me down to my next departure.

Q. What was your next departure?

A. Mare Island Light.

Q. Now, when the “Warren” crossed your bow as you have testified, how far off was she?

A. About 1,000 feet.

Q. How do you fix that distance, Captain?

A. Figuring on the time my ship was backing before the collision.

(Deposition of T. D. McFarland.)

Q. Is that the only thing you go by in determining that distance?

A. That is the only way I have to in the night-time.

Q. That is the only thing you go by, is it?

A. Yes, sir.

Q. Could it not have been, as a matter of fact, 500 feet that the distance was, as far as you know? Is that not merely a guess?

A. A matter of judgment.

Q. It could have been 500 feet, could it not?

A. I figured it was about a thousand.

Q. But you are not certain, are you, Captain?
[80]

A. Not positive.

Q. Could it have been more than a thousand?

A. Possibly.

Q. Could it have been as much as 1500?

A. Not in my own judgment.

Q. Not in your judgment, but it might have been 1500, might it not?

A. Not in my judgment, it was not.

Q. How long after the "Warren" crossed your bow, was it, that she blew that one whistle signal that you spoke of? A. Very short time.

Q. How short a time? A. Less than a minute.

Q. Had she crossed your bow entirely at that time, or only partly?

A. Only partly; only enough to show the green light on my starboard bow.

Q. How far on your starboard bow did she show

(Deposition of T. D. McFarland.)

her green light at the time? A. Just a short ways.

Q. How far would you say in points?

A. It was not—possibly a quarter of a point.

Q. If at that time the distance between the two vessels had been 500 feet, would you not have run her down? A. I don't think so.

Q. How near together, in your opinion, considering all the circumstances, would they have had to be so that you would have run her down, assuming that the "Warren" had crossed your bow, and her green light was a quarter of a point to your star-board?

A. It depended on what angle she was coming.

Q. What angle was she to your course when she crossed? A. That I couldn't say.

Q. You did not see the barge, or the tug herself, did you? A. No, sir.

Q. Just saw the lights? A. Yes, sir. [81]

Q. Could not tell what direction the lights were coming from?

A. No, sir—I could tell what direction, but I couldn't tell what angle she was coming on.

Q. Captain, did you blow any whistle from the "Meteor" before the one whistle signal came from the "Warren"? A. No, sir.

Q. Did you change your course before that time?

A. No, sir.

Q. Did you do anything with reference to the speed of the "Meteor" at all? A. No, sir.

Q. The moment before that whistle of the "Warren" blew, you were going full speed ahead, were you

(Deposition of T. D. McFarland.)

not? A. Yes, sir.

Q. And when the one whistle blew you were going full speed ahead? A. Yes, sir.

Q. What did you say the speed of your vessel was?

A. About eight knots.

Q. Was it not a little more?

A. I don't think so.

Q. If the quarter-master testified and said it was ten knots, what would you say with reference to that?

A. The quarter-master has no way of knowing what the speed of the ship is.

Q. You would say he was mistaken, would you?

A. Yes.

Q. Are you prepared to say that the speed of the "Meteor" at that time was not more than eight knots, Captain?

A. It might have been a little more or a little less; I wouldn't say exactly. That is about her speed when she is loaded.

Q. She was not fully loaded, was she?

A. No; she was bucking a tide, which offsets the difference.

Q. What was the first order you gave on your steamer, Captain? A. The first order? [82]

Q. Yes. A. Hard-a-port.

Q. When did you give that order?

A. The minute I heard the one whistle on the tug.

Q. You did not give any other order before that, did you? A. No, sir.

Q. To whom did you give that order, Captain?

A. The quarter-master.

(Deposition of T. D. McFarland.)

Q. Where was he?

A. Standing alongside of me at the wheel.

Q. You are positive you never gave him any other order before this one, are you? A. Yes, sir.

Q. Did you ever give him any order to starboard his helm? A. No.

Q. At any time during that morning?

A. At any time during that morning.

Q. I mean about the time of the collision.

A. No.

Q. What impression did you get, Captain, after the "Warren" had crossed your bow, and her green light was visible to your starboard when you heard her blow one whistle; what did that indicate to you?

A. It indicated that he wanted to pass me on my port side.

Q. Did you then think that he then had time to pass you on his port side? A. I did not.

Q. Did you know that he had no time?

A. In my judgment, he could not.

Q. That was the impression that you then had, that he could not? A. Yes, sir.

Q. You had that impression firm, had you not, Captain? A. Yes, sir.

Q. But you answered his one whistle by giving him one whistle? A. Yes.

Q. How long after that was it, Captain, that you gave the three whistles?

A. A small part of a second. [83]

Q. A small part of a second?

A. Immediately after.

(Deposition of T. D. McFarland.)

Q. What did you give that signal for?

A. Showing that I was backing full speed.

Q. Did you give any order on your vessel corresponding with that signal?

A. I rung the telegraph myself.

Q. Did you ring it before you gave the three whistles, or after?

A. I had one hand on the whistle-string, and one hand on the telegraph, at the time.

Q. You gave the two signals simultaneously, did you? A. Yes, sir.

Q. Now, with reference to that time, Captain, I want you to fix now that exact moment when you gave those two simultaneous signals. With reference to that time, when was it that you ordered the wheelsman to put the helm hard aport?

A. Just the minute I heard the one whistle.

Q. Was that before you gave your three whistles?

A. Yes, sir.

Q. Before you gave your three whistles. Do you know if the man at the helm obeyed your order?

A. Yes, sir.

Q. How do you know, Captain?

A. I could see him move the wheel right there.

Q. Did you give him any help in moving the wheel? A. No, sir.

Q. Did any one give him any help? A. No, sir.

Q. Did the wheel move easily?

A. It was steered by steam.

Q. Now, Captain, with reference to the lights of the "Warren": Did you at any time see any light

(Deposition of T. D. McFarland.)

except the green light on the “Warren”?

A. The green light and the two mast-head lights.

Q. Did you at any time see any other light on the “Warren”?

A. Just before the time I got the one whistle she showed the red light. [84]

Q. Just the same time, or afterwards?

A. Just about the time he blew the one whistle.

Q. You cannot tell whether it was a little before or after? A. The same time.

Q. When he blew the one whistle, I suppose you kept your eye on him? A. Yes, sir.

Q. Then the red light turned up?

A. He showed all the three lights.

Q. You are sure you saw them all at the same time, the green light, the red light and the mast-head lights? A. Yes, sir.

Q. Was it before you saw them or after you saw them, that you signaled the engine-room “full speed astern”?

A. After I saw them.

Q. Captain, did you see the vessels come together when they finally did come together?

A. Yes, I saw them strike.

Q. Are you sure of that, Captain? A. Yes, sir.

Q. Did you not testify, the other day, before a local inspector, that you did not see them strike?

A. I don't think so.

Mr. DENMAN.—What do you mean, Mr. Hengstler, by “seeing them strike”? Do you mean the two vessels when they were striking?

Mr. HENGSTLER.—At the moment they came

(Deposition of T. D. McFarland.)

together, and how they came together.

A. I don't mean how they came together, I was looking over the bridge at the time they came together. I could recognize them as a scow and a tug.

Q. You knew before that it was a tug with a barge? A. With a tow, yes.

Q. You knew that a minute before, just as soon as you saw the lights in the beginning—you knew that it was a tow? [85]

A. That it was a tow.

Q. I suppose you could not tell at that time whether the barge was lashed to the side or whether she was by hawser, could you—or could you tell that from the beginning? A. Not at the beginning.

Q. Not at the very beginning, but you could tell minutes before the collision, that they were together, could you not? A. Yes, sir.

Q. Could you tell, as long as five minutes before the collision, that they were side by side?

A. Oh, I couldn't say in regard to minutes.

Q. What?

A. I couldn't say positive in regard to time.

Q. You saw the lights ten minutes before the collision, you testified, I believe? A. Yes, sir.

Q. Could you tell, five minutes before the collision, what the lights meant, that they meant a tug with a barge by her side?

A. Well, the only reason that I supposed it was so, was because I couldn't see any lights astern of them, to indicate that she was towing anything astern.

Q. That was the impression that you got, that it

(Deposition of T. D. McFarland.)

was a tug? A. Yes.

Q. And a barge by her side? A. Yes.

Q. After the collision, Captain, when you swung around to come back to the "Warren," you said you got within about an eighth of a mile to the shore, did you? A. I should judge about that, yes.

Q. Were you familiar with the waters in that neighborhood? A. Yes, sir.

Q. You had been there before? A. Yes.

Q. Do you know, with reference to the depth of the water, how near you can get to that—whether it would be safe to get with a [86] vessel with the draft of the "Meteor"?

A. You can practically go up alongside of that shore; that is, in line with the jetty there, the South Vallejo jetty, and the point above it. You can't go much inside of the line of the jetty and the point.

Q. You can go practically along the shore with a vessel of the size of the "Meteor"?

A. There is water enough to go there, but it is not practical to go there.

Q. Could you, without any danger of straining?

A. No.

Q. You could not? A. No.

Q. Without any danger of getting on the rocks or on the shore?

A. It would not be practical to go there.

Q. When you got within one-eighth of a mile, did you feel safe with the "Meteor"?

A. No, I did not.

Q. Did you think you were in any danger of get-

(Deposition of T. D. McFarland.)

ting on the beach there?

A. Not exactly danger, but it was not a pleasant job to try and turn around there so close to the beach.

Q. Now, with reference to the barge after the collision, Captain. I did not understand what you did. Did you make any attempt to save the barge?

A. After the captain of the tug said that he did not have any anchors to the tug, I told him I couldn't go and pick up the barge with the tug alongside.

Q. Did he ask you to go and pick up the barge?

A. No, not that I remember.

Q. Did he not suggest that you pick up the barge?

A. Not that I remember of.

Q. Anyway, you did not make any attempt to pick up the barge, did you?

A. I told him that if he would anchor the tug, I would go and pick up the barge for him. He said he hadn't any anchors; and afterwards I offered him the assistance of two sailors to go and help him anchor the barge.

Q. Could you have placed both the tug and the barge into a place [87] of safety after the collision?

A. If the tug had had anchors, I think I could have fixed up the scow.

Q. Could you not have done it anyway?

A. No. It would not be practical, with the lines there were on board the tug.

Q. Would it have been possible? A. It might.

Q. But you did not think it was practicable, did you? A. No.

(Deposition of T. D. McFarland.)

Q. And you did not attempt to do anything at all about it. You let her drift, did you not, Captain?

A. Nothing more than to give him two men to assist him go and anchor the barge.

Q. Did you send those two men over to the tug and then he sent them out to the barge?

A. The tug was alongside, and they went from there, they were sent out in the tug's boat.

Q. Was that not the result of a request of Captain Hammer for you to take the barge in tow also, Captain? A. No.

Q. You are sure about that?

A. Very positive he never asked me.

Q. Never asked you to tow the barge? A. No.

Q. Never asked you to do anything about the barge, did he?

A. I think it was my own first suggestion, that if he anchored the tug I would go and pick up the barge for him.

Q. Are you very positive about that?

A. I am not positive.

Mr. DENMAN.—At any rate, that was suggested between you? A. Yes.

Q. You do not know whether it was your suggestion or his? A. No.

Mr. HENGSTLER.—Q. But it might have been his suggestion?

A. It might have been; but I think I suggested that he anchor his tug and I would go and pick up the barge, before he mentioned the barge. [88]

Q. At the moment of the collision, was your vessel

(Deposition of T. D. McFarland.)

swinging around? A. Yes.

Q. Swinging in what direction?

A. The nose was swinging to starboard, and her stern was swinging to the port.

Q. What was that the result of?

A. With the wheel hard over, and backing at the same time full speed.

Q. It was the result of backing full speed astern, and the wheel being hard over? A. Yes.

Q. The wheel was hard over until the moment of the impact, was it not? A. Yes.

Q. When that one whistle blew from the "Warren," Captain, did you think that the maneuver which it indicated was a reasonable maneuver under the circumstances? A. I did not.

Q. Was it your impression that it was a dangerous maneuver at that time? A. I did.

Q. You considered it that moment, did you not, that there was danger of a collision? A. I did.

Redirect Examination.

Mr. DENMAN.—Q. Captain, your backing of the vessel was for the purpose of avoiding a collision?

A. It was.

Q. And how far was that successful; had you stopped her at all at the time the collision occurred?

A. Well, in relation to the way the tug and the scow drifted by after the collision, we were practically stopped.

Q. You were practically stopped then. Your maneuver was then almost successful?

A. Yes, sir.

(Deposition of T. D. McFarland.)

Q. And it seemed to you the best thing to do under the circumstances? A. Yes.

Q. How great were the injuries to your vessel?

A. The contract was \$9,875, or thereabouts—within a few dollars. [89]

Q. Contract for what?

A. Replacing and repairing the bow and damages done.

Q. And that was the cost for repairing it. What were the injuries to the bow?

A. There was several plates bent and several of her frames broken.

Q. How near the water mark?

A. Above the water-mark.

Q. Was she making any water after the collision?

A. Not while we were in smooth water.

Q. Were you, or were you not, apprehensive as to the injury to your vessel, after the collision?

A. I was.

Q. Now, Captain, judging from the character of the injuries, as indicated, as you saw them, had you succeeded in efficiently stopping the vessel at the time of the collision?

A. Practically I had her stopped.

Q. What would have been the result if she had been going ahead full speed, with reference to the injuries she had received?

A. She probably would have sunk.

Q. Now, what portion of the scow struck the vessel?

A. By the look of the dent in her bow, it must have

(Deposition of T. D. McFarland.)

been the corner of the scow.

Q. From where you stood on the bridge, could you or not see the exact impact of the scow, of the corner of the scow, on your vessel? A. No.

Q. You could see the two vessels at the time they came together, but could not see the exact point of the impact? A. I could not.

Mr. HENGSTLER.—Q. You simply judge that it was the corner of the scow, from the nature of the wound? A. Yes.

Mr. DENMAN.—Q. As I understand you, Captain, if you had been going ahead full speed, undoubtedly the skin of the vessel would [90] have been penetrated, and she would have sunk; that is your opinion? A. Yes.

Q. How long had you been backing?

A. Two minutes by the bridge clock; by the engine-room clock, the engineer reported three minutes.

Q. How soon after you commenced to back did the vessel respond? A. Immediately.

Q. And she yields readily, does she, to backing?

A. Yes, sir.

Q. So that, during this entire period, this two minutes that you have described, she was slowing down? A. Yes, sir.

Q. Now, Captain, as I understand it, the "Ada Warren" was passing in front of you from port to starboard. The green light was approaching your bow, and finally crossed your bow, and as I understand it, it was your impression that you were to pass astern of her, and I presume it was natural that

(Deposition of T. D. McFarland.)

you should have desired to slow off to her stern with your vessel. Had you time to make any such maneuver after she had crossed your bow?

A. I would have, if he had not blown the one whistle and shown his lights.

Q. Would it have been a natural thing, when she had the right of way and passed you by, to have thrown your vessel over?

Mr. HENGSTLER.—I object to the question on the ground that his testimony shows that he did not do it.

Mr. DENMAN.—I withdraw the question.

Q. Would it have been a natural thing, when your vessel ceased to have the right of way, and the “Warren” had crossed your bow, to swing her to port, so as to ease around the stern of the “Warren”? A. Yes, sir. [91]

Q. And did you start, or did you not start, to make such a maneuver?

A. I was about on the point to do it when he blew the one whistle. I had my hand on the whistle-cord to make that move.

Q. You are certain, then, that the quarter-master had not, himself, thrown the wheel over for that move? A. No.

Q. That is to say, you are certain, Captain, that he had not started? A. Yes.

Q. Might it not have been possible, Captain, that you had started to give the order to put the wheel to starboard, just about the time of the one whistle from the other boat?

(Deposition of T. D. McFarland.)

Mr. HENGSTLER.—I object to the question on the ground that he has positively testified that no such order was given, and that no such maneuver was undertaken, and that this question can only be asked for the purpose of impeaching counsel's own witness. He has said positively in answer to my question, that no such maneuver was undertaken, nor did he give any such order.

Mr. DENMAN.—The point I desire to make is that the vessels were at this time *in extremis*, that it was quite possible that an order was started to be given at this time which was not executed on account of the rapid succession of events, and the cross-examination having been confined to the orders actually given, I desire to bring out that there were orders which it was desirable to give, but which were not actually given, if such be the fact. I desire to bring out from the Captain the testimony of the occurrences exactly as they were, in view of the exciting circumstances that then transpired. I desire to know whether or not any orders were started to be given which the rapid succession of events prevented the performance of, or prevented the completion of, with reference to showing the rapid change, if any, in the Captain's mind in his judgments [92] regarding the movements of the ships.

Mr. HENGSTLER.—And I wish to state again that I object to this attempt to make the Captain change his testimony, on the grounds that he has already positively testified that he had not given any orders to the quarter-master, except one order to put his helm hard-a-port.

(Deposition of T. D. McFarland.)

Mr. DENMAN.—Q. I will restate the question: Captain, you have heretofore testified that the quarter-master was not given any order to put the helm to port prior to the time that the one whistle was blown from the “Warren.” Did you at any time prior to the blowing of that whistle, start to give such order? A. To port, no, sir.

Q. Now, Captain, did you at any time, about the time that you put your hand to the whistle-cord, prior to the whistle that was blown on the “Warren,” start to give an order to the quarter-master, to put the wheel to starboard?

A. I took hold of the whistle-cord with the intention of blowing him two whistles to go to starboard. I hadn’t given the order.

Q. That is the best of your recollection, that you had not given the order? A. Yes.

Q. But you did not do it? A. No, sir.

Q. And before you had time to do it, the whistle came from the “Warren”? A. Yes, sir.

Q. Was the quarter-master awaiting that order?

Mr. HENGSTLER.—In other words, the quarter-master was a mind-reader?

Mr. DENMAN.—I presume that Mr. Hengstler refers to some testimony given by some quarter-master which differs from the Captain’s with regard to the orders that were actually given.

Mr. HENGSTLER.—And with reference to which testimony counsel has attempted to obtain from the witness testimony in [93] contradiction to the positive testimony previously given.

(Deposition of T. D. McFarland.)

Mr. DENMAN.—In consideration of the position of the vessels, after the green light had passed the bow of the “Meteor,” it was natural for the quartermaster, and for all persons, to expect an order to bring the vessel to port, so as to pass astern of the tug and tow, and the question is directed to the Captain for the purpose of showing his condition of mind at the time that the red light was suddenly shown him from the tug.

Mr. HENGSTLER.—I have nothing further to say.

Mr. DENMAN.—Q. Now, Captain, when you speak of the distance of 1,000 feet between the two vessels—you say the night was clear? A. Yes, sir.

Q. And that you were some 30 feet above the water line? A. 30 or 35.

Q. And that you could see the other vessels?

A. Yes, sir.

Q. And their lights? A. I saw their lights.

Q. And could you see the bulk of the two vessels together? A. Yes, the bulk of them.

Q. Did you take these facts into consideration, as well as the time occupied in backing, in determining the distance apart that the vessels were; did you base your judgment on all these matters?

A. No, I based it on the times he was backing.

Q. There was nothing in anything you saw that contradicted that impression, that they were about that distance apart? A. No.

Mr. HENGSTLER.—No further questions. [94]

**[Certificate of Notary Public to Deposition of T. D.
McFarland.]**

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, Frank L. Owen, a Notary Public in and for the City and County of San Francisco, State of California, do hereby certify:

That the reason for taking the foregoing deposition, and the fact is, that the testimony of the witness T. D. McFarland is material and necessary in the cause in the caption of said deposition named, and that the said witness intends to travel more than one hundred miles from the place of trial before the time of trial.

I further certify that, on the 6th day of February, in the year one thousand nine hundred and seven, at two o'clock P. M. of said day, I was attended by Messrs. William Denman and James R. Pringle, proctors for the libellant, and by Louis T. Hengstler, Esq., proctor for the respondent, and by the said witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth; that said deposition was, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by Erwin M. Cooper, and afterwards reduced to type-writing; that the reading over and signing of said deposition by the said witness were, by the aforesaid stipulation, expressly waived.

And I further certify that I am not of counsel, nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

I further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the Clerk of the District Court of the United States, in and for the Northern District of California, the Court for which the same was taken.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand [95] and affixed my seal of office, at my office in the City and County of San Francisco, State of California, this 15th day of February, 1907.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Opened and filed in open court this 13th day of February, A. D. 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [96]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 20th day of February, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,602.

GLOBE NAV. CO.

vs.

Tug "ADA WARREN."

No. 13,848.

WARREN IMP. CO.

vs.

SS. "METEOR," etc.

Order Submitting Cause.

These causes this day came on regularly for argument, [Mr. Wm. Denman appearing on behalf of Globe Navigation Co., and the claimant of the SS. "Meteor," and Mr. L. T. Hengstler appearing for the claimant of the tug "Ada Warren," and the Warren Imp. Co. Thereupon after argument, it is ordered that the cause be, and the same is hereby submitted to the Court for decision. Further ordered that Mr. Hengstler be and he is hereby allowed 10 days in which to file a brief and Mr. Denman is allowed 10 days in which to file a reply brief. [97]

[Minutes—February 26, 1909—Order Dismissing Libel, etc.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 26th day of February, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 13,602.

GLOBE NAVIGATION COMPANY, LIMITED,
vs.

Tug "ADA WARREN," etc.

No. 13,648.

WARREN IMPROVEMENT COMPANY
vs.

American S.S. "METEOR," etc.

These causes as consolidated, having been heretofore submitted to the Court for decision, now after due consideration had thereon, the Court files its written opinion, and by the Court ordered that the libel of the Warren Improvement Company against the American Steamship "Meteor," No. 13,648, be and the same is hereby dismissed with costs. Further ordered that libelant in the case of Globe Navigation Company, Limited, against the "Ada Warren" etc., No. 13,602, is entitled to recover the damages resulting from the collision referred to in the libel, and costs.

Further ordered that decrees be entered in accordance with the conclusions contained in the opinion filed, and that the case of the Globe Navigation Company, Limited, vs. the Tug "Ada Warren," No. 13,602, be, and the same is hereby referred to United States Commissioner, Jas. P. Brown, to ascertain and report the amount of damages sustained by the libelant herein. [98]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,602.

GLOBE NAVIGATION COMPANY, LIMITED,
a Corporation,

Libelant,

vs.

Tug "ADA WARREN," Her Tackle, Apparel and
Furniture,

Respondent.

No. 13,648.

WARREN IMPROVEMENT COMPANY,

Libelant,

vs.

American S. S. "METEOR,"

Respondent.

Opinion.

WILLIAM DENMAN, Proctor for Steamship
"Meteor" and Globe Navigation Company.

ANDROS & HENGSTLER, Proctors for "Ada
Warren" and Warren Improvement Com-
pany.

DE HAVEN, District Judge.

These are consolidated cases growing out of a col-
lision about the hour of 4 A. M., on the morning of
October 11, 1906, between the steamship "Meteor"
and the tug "Ada Warren." The "Meteor" was
coming down the straits of Carquinez from Port
Costa, and the "Ada Warren" was bound for Suisun

Bay, towing a heavily loaded barge, lashed to her starboard side.

The "Ada Warren" did not call any eye-witness of the [99] collision to testify in her behalf. The story of the collision, as told by the master of the "Meteor," is substantially as follows:

The night was clear. He first observed, about a point and a half off the port bow of the "Meteor" the lights of the tug and tow. The lights seen were two mast-head lights and a green light. The green light was proceeding across the straits, but he was not able to determine whether the "Ada Warren" was going directly across the straits or at an angle; he thought, however, that she was making for South Vallejo. When the vessels were about one thousand feet apart, the green light of the "Ada Warren" crossed the bow of the "Meteor" from port to starboard, until it was to be seen probably one-quarter of a point on the starboard side of the "Meteor"; and then the "Ada Warren" immediately showed both red and green lights and blew one whistle. Up to this time the "Meteor" had held her course, and speed, which was about eight miles per hour. The "Meteor" answered with one whistle, and her wheel was at once put hard aport, and seeing that a collision was imminent she blew three whistles and was started astern full speed. The effect of this was to swing her bow to starboard.

The "Ada Warren" never gave any other signal than the one whistle.

The starboard bow of the barge struck the "Meteor" about thirty-five feet aft of her port bow.

The master of the "Meteor" further testified that

when the collision occurred his vessel was about one-quarter of a mile from the shore, on the starboard side of the "Meteor," as she was coming down the straits; and that in his judgment there would have been no collision if the "Ada Warren" had not given the signal of one whistle and changed her course after crossing his bow. The testimony of the master of the "Meteor" finds substantial corroboration in that of the witness Miller, who was a passenger on the "Ada Warren," at that time. [100]

The only evidence which may be said to conflict with the foregoing was that of the master of the "Ada Warren" who testified that he came upon the deck immediately after the collision and looked about and observed that the "Ada Warren" was then about one-quarter of a mile off the shell factory at Selby's, which is on the Port Costa side of the straits. This evidence, if accepted as true, would tend to show that the collision must have taken place near the Port Costa side of the straits, and not within one-quarter of a mile from the opposite shore, as testified to by the master of the "Meteor," and would also show that the master of the "Meteor" was mistaken in saying that he first observed the lights of the "Ada Warren" when she was three miles distant, and kept such lights in view until the time of the collision.

I have carefully considered the able argument advanced by the proctor for the "Ada Warren," in support of his contention that the collision took place near the Port Costa side, but do not think I would be warranted in rejecting the positive testimony to the contrary, given by the only two eye-witnesses of the

collision, appearing in the case.

The testimony of the master of the "Meteor," and the witness Miller as to the place, and as to the circumstances immediately preceding and surrounding the collision, is not so inherently improbable as to justify the Court in rejecting it.

This leaves for consideration only the question of the nature of the decree which the Court should enter in view of the facts established by the testimony of the master of the "Meteor."

When the lights of the "Ada Warren" were first seen, by the master, the vessels were on crossing courses, and as the "Ada Warren" had the "Meteor" on her starboard bow, it was her duty to keep out of the way.

Hughes on Admiralty. Sec. 130.

And she was in fault in attempting to cross the bow of the [101] privileged vessel, under the circumstances disclosed by the evidence.

The *George S. Schultz*, 84 Fed. 508.

And because of this fault, the collision must be attributed, solely, to the "Ada Warren," unless it appears from the evidence that the "Meteor" was also guilty of some negligence, which contributed thereto.

It is claimed in behalf of the "Ada Warren," that the "Meteor" was not justified in holding her course and speed until almost the moment of the collision; that before that time she had ample warning that the "Ada Warren" was burdened with a tow, and was about to cross her bow; that the "Meteor" did not have the right of way after her master saw that the

“Ada Warren” was about to fail in her duty to keep out of the way, and that she should then have adapted her maneuvers to the new situation and put her helm to starboard and gone around the stern of the “Ada Warren.”

But I am of the opinion, after a careful consideration of the evidence, that the “Meteor” was not in fault, in holding to her course and speed. The evidence does not show that at any time before the “Ada Warren” crossed the bow of the “Meteor,” and gave the signal of one whistle, the situation was such as to justify the master of the “Meteor” as a prudent navigator in believing that a collision was imminent, unless he changed the course of the “Meteor” and slackened her speed for the purpose of keeping out of the way of the burdened vessel.

The rule upon this point is clearly stated by the Supreme Court, in *The Delaware*, 161 U. S. 468.

“The cases of *The Britannia*, 153 U. S. 130, and *The Northfield*, 154 U. S. 629, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon [102] the possibility, or even of the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and

which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent."

MY CONCLUSIONS, from the evidence, are:

1. That the libel of the Warren Improvement Co. vs. The American Steamship "Meteor," No. 13,648, is not sustained by the evidence, and must therefore be dismissed, with costs;

2. That the libel of the Globe Navigation Company, Limited, vs. The "Ada Warren," etc., No. 13,602, is sustained by the evidence, and that said libelant is entitled to recover the damages resulting from the collision referred to libel, and costs.

LET DECREES BE ENTERED in accordance with these conclusions, and case No. 13,602, will be referred to United States Commissioner Brown to ascertain and report the amount of damages sustained by the libelant therein.

[Endorsed]: Filed Feb. 26, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [103]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday the 26th day of January, in the year of our Lord, one thousand nine hundred and twelve. Present: The Honorable R. S. BEAN, Judge.

[**Minutes—January 26, 1912—Re Filing of Report of
U. S. Commissioner.**]

#13,602.

GLOBE NAVIGATION COMPANY, LIMITED,
vs.

Tug “ADA WARREN,” etc.

Wm. Acton, Esqr., this day came into court and presented and filed the report of the United States Commissioner herein as to the damages sustained by libelant. [104]

*In the District Court of the United States, for the
Northern District of California.*

GLOBE NAVIGATION CO., LTD., a Corporation,
Libelant,

vs.

The “ADA WARREN,” etc.,

Respondent.

Report of Commissioner on Damages Sustained.

This action grew out of a collision in San Pablo Bay between the ore laden steamer “Meteor,” bound for Puget Sound ports, and the tug “Ada Warren,” and her tow consisting of a barge laden with rock.

The Court sustained the libel of the Globe Navigation Company, owners of the “Meteor,” and ordered the case referred to me as United States Commissioner to ascertain and report the amount of damages suffered by the libelant.

On the 28th day of October, 1911, Wm. Denman,

Esq., proctor for libelant, appeared before me and offered in evidence the depositions of Frank Walker, C. W. Wiley and C. F. Thorndyke, taken at Seattle before N. W. Bolster, and the cause was submitted "on these depositions and on the testimony of Mr. Page" with briefs to follow.

AFTER A CAREFUL CONSIDERATION of said testimony, which is hereto attached and made part hereof, I, James P. Brown, United States Commissioner, report as follows:

Immediately following the collision, the "Meteor" proceeded [105] to San Francisco where she was surveyed by I. E. Thayer, marine surveyor, October 12, 1906 (p. 15, Lib. Ex. "A"). After undergoing temporary repairs involving a delay of two days the vessel proceeded to Puget Sound. She was again surveyed at Tacoma, October 18, 1906, by Frank Walker, a marine surveyor, who made a report of the damages sustained by the ship and drew up specifications for repairs. A contract for these repairs was awarded to the Standard Boiler Works for \$9,875.

While there are gaps in the testimony which seeks to connect the injuries repaired under the specifications with the injuries sustained in the collision, the fact seems sufficiently established that the damage reported by Thayer, the San Francisco surveyor, immediately following the collision, and confirmed by Walker, the Tacoma surveyor, were the result of the collision.

I find the damage sustained by the "Meteor," in said collision, to be the sum of \$9,875, plus \$34.80,

the cost of "fairing" the anchor.

After discharging cargo the "Meteor" was delivered to the contractor and lay days commenced to run at 7 A. M. on the 22d day of October, 1906. Repairs were made at Chesley's Dock, Seattle. The vessel departed Nov. 6, fifteen days later, for St. Helen's to take on cargo. Some repairs on the vessel were undertaken by the same contractor at St. Helen's which libelant claims were a continuation of the repairs of collision-damage and it seeks to recover the sum of \$410 for transporting mechanics from Seattle to St. Helen's and for the maintenance and wages of mechanics while engaged in that work. The connection between this work and the collision-damage is too uncertain to justify burdening respondent therewith. In the absence of more definite testimony than is offered this item is disallowed. The contract [106] was presumed to cover all labor involved in repairing collision-damage. The wage items are not confined to night-work or to Sunday work, or for lost time in traveling, they are largely plain items for day's labor which, in spite of the testimony of Walker, in the absence of further explanation, must be considered as covering either labor outside of the contract or repairs outside of collision-damage.

DEMURRAGE.

Libelant also claims demurrage for detention. There is in the evidence a charter-party dated Sept. 21, 1906, containing an agreed demurrage of \$10 per hour for delays, etc. (Exhibit "D"). The contract covering the repairs here involved contains an

agreed penalty of \$150 per day for each day the vessel is detained over fifteen working days. (Exhibit "A," page 26.) And there are trip sheets prepared by libelant and filed in evidence by respondent (Exhibit 2) and known as "Voyage Earnings and Expenses," covering the voyages of the "Meteor" extending from June 30th, 1906, to Oct. 22, 1906, showing net earnings amounting to \$14,801.76.

The full period of the voyage reports covers 115 days, and the net earnings per day amount to \$128.71, which sum I find to be the reasonable value of the daily net earnings of said "Meteor" at the period of her detention.

Libelant claims the following items of damage in addition to its net earnings for the 17 days of detention:

Depreciation	\$26.65	per day	
Maintenance	5.00	"	"
Insurance	35.00	"	"

[107]

Coal, 7 tons at 3.95	26.25	"	"
Water	5.00	"	"
Wages (excluding sailors, at San Francisco)	44.14	"	"
2 days additional crew at San Francisco at	35.72	"	"

Neither depreciation nor maintenance while a vessel is moored to a dock are sufficiently established by the testimony to justify charging respondent therewith or treating the same as recoverable expense. Depreciation in this case is an arbitrary, estimated, speculative sum covering the deterioration of a vessel

while engaged in its usual and hazardous occupation. In this case it is not carried on the books of this company, not deducted from the gross earnings here considered, and is not supported by sufficient evidence to fix a fair rate. The sum here claimed is a matter of bookkeeping rather than a matter of fact.

The figure for maintenance libelant secures by ascertaining the average daily cost of maintenance while the vessel was in operation for the period above stated, June 30, 1906, to October 22, 1906. This expense, according to the voyage sheets, amounted to \$12.45 per day. Proctor for libelant, by a random reduction, scales down this amount of \$5 per day "while at the dock with her fires banked handling plates," etc. Besides the collision involved in this case, during the time included in this estimate of maintenance, obtained as above stated, the "Meteor" had run aground, started bolts and had been otherwise injured. On another occasion within this period she had struck a snag with her propeller, [108] involving a severe jarring of the vessel and the installing of a new propeller blade, at another time within the same period she had fouled a mooring dolphin, consisting of 1 center pile and 6 bracing piles bound together with steel wire rope, and carried the structure away. It does not appear from the evidence that any portion of the damage caused by this chapter of accidents is included in "maintenance" during this time, but it is clear that neither depreciation nor cost of maintenance, while safely moored at a dock, could bear any reasonable relation to cost of maintenance or to depreciation while in

operation under similar conditions. The items for depreciation and for maintenance are disallowed.

Libelant claims the cost of 7 tons of coal, daily, consumed for the 15 days while repairs were under way and for the two days the vessel was detained at San Francisco. The latter claim is reasonable and is allowed. But there is nothing in the specifications calling for the use of the vessel's steam in handling plates for the contractor while repairs were under way. The contract was let upon these particular specifications despite any verbal and apparently gratuitous advantage to one contractor volunteered by the surveyor. The charge for coal for these fifteen days amounts to \$393.75. After carefully considering the testimony of the libelant's general manager, Thorndyke, and the testimony and unfortified opinion of the marine surveyor Walker, this charge for coal is disallowed except for two days while detained at San Francisco. The charge of \$5 per day for water is disallowed, there being no testimony whatever on the subject.

On the question of crew I allow the full amount claimed by libelant for the full crew and subsistence for the two days at [109] San Francisco, amounting to \$79.86 per day. For the 15 days while undergoing repairs at Seattle there was no good reason for which respondent is responsible, for retaining on full pay "a crew of 14 men including the officers." The testimony shows that these men were performing services for libelant and worked full time preparing the vessel for its next voyage. Even though they performed no work, this is not such an expense

as should be imposed upon respondent. The wages and subsistence of a captain, at \$6.75 per day, a day watchman at \$2.06 per day, and a night watchman at \$2.06 per day, while the vessel was at the dock undergoing repairs, is allowed.

On the question of insurance, manager Thorndyke testified the premiums amount to \$35 per day. I find from the voyage sheets the rate to have been \$33.85 per day, which is allowed. It is a fixed proper and usual expense that was deducted from gross earnings to ascertain the net earnings here found. The compulsory detention resulting from the collision not only deprived libelant of its net earnings, but deprived it of its gross earnings out of which to pay the usual, actual and unavoidable fixed charges and expenses of the vessel. To disallow this expense would be to allow libelant a sum of \$575.45 less than its net earnings. It differs from depreciation and maintenance in this case in that it is a fixed unvarying figure. An actual recovery of net earnings would be defeated if the contentions urged by respondent were upheld.

Summarizing the foregoing report, the damage suffered and proved by libelant herein I find to be as follows: [110]

Contract price for repairs.....	\$ 9875.00
Cost of fairing anchor.....	34.80
Cost of crew at San Francisco, 2 days @ \$79.86	159.72
Cost of captain and two watchmen 15 days at Seattle @ \$10.87.....	163.05

Value of net earnings, 17 days at \$128.71	
per day.....	2188.07
Insurance 17 days at \$33.85 per day.....	575.45
	<hr/>
	\$12,996.09

This allowance equals a demurrage of \$242.42 per day for the two days while the vessel was at San Francisco and \$173.43 per day for the 15 days while undergoing repairs.

I further find that the 17 days detention ended Nov. 6, 1906, and interest on award for detention should commence on that date. The bills for repairs were paid Nov. 27, 1906, and interest on that account should commence to run from that date.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

JAS. P. BROWN. [Seal]

United States Commissioner.

[Endorsed]: Presented in open court and filed Jan. 26, 1912, Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. (At the time of the filing of this Report there was attached to same the following documents: Deposition of George E. Page; and deposition of Frank Walker et al.; and certain exhibits, which are transmitted under separate cover.) [111]

[Deposition of George E. Page, for Libelant, in Case No. 13,602, Globe Nav. Co. v. Tug "Ada Warren."]

In the District Court of the United States, in and for the Northern District of California.

No. 13,602.

GLOBE NAVIGATION COMPANY

VS.

The Tug "ADA WARREN."

BE IT REMEMBERED that on Monday, October 16th, 1911, pursuant to stipulation of counsel hereunto annexed, at the office of William Denman, Esq., 454 California Street, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., GEORGE E. PAGE, a witness produced on behalf of the Libelant.

WILLIAM DENMAN, ESQ., appeared as attorney for the libelant and L. T. HENGSTLER, ESQ., appeared as attorney for the claimant, and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth:

It is hereby stipulated and agreed by and between the attorneys for the respective parties, that the deposition of George E. Page may be taken *de bene esse* on behalf of the Libelant, at the office of William

Denman, Esq., 454 California Street, in the City and County of San Francisco, State of California, on Monday, October 16, 1911, before Francis Krull, a United States Commissioner for the Northern District of California, and in shorthand by Charles R. Gagan.

It is further stipulated that the deposition, when written out, may be read in evidence by either party on the trial [112] of the cause; that all questions as to the notice of the time and place of taken the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the said testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.

[Deposition of George E. Page, for Libelant.]

GEORGE E. PAGE, called for the libelant, sworn.

Mr. DENMAN.—Q. What is your occupation?

A. Shipbroker.

Q. Where is your office?

A. 310 California Street.

Q. How long have you been engaged in that business? A. Since 1883.

Q. Continuously since 1883? A. Yes.

Q. As a shipbroker, what is your business?

A. The chartering of vessels, acting as the agent between the owners and the charterers.

Q. In the course of that business have you heard of the steamer "Meteor," belonging to the Globe

(Deposition of George E. Page.)

Navigation Company? A. Yes, sir.

Q. She has been chartered from time to time on the market here, has she? A. Yes, sir.

Q. Do you recollect the conditions of your business in the latter portion of the year 1906?

A. Yes, sir.

Q. I call your attention particularly to the period between the middle of October and the middle of November, 1906, what was [113] the condition of the demand for tonnage such as the steamer "Meteor" had at that time?

A. The demand was good.

Q. What was the occasion for that?

A. The amount of lumber that was necessary for the rebuilding of San Francisco.

Q. That was just after the great fire and earthquake in 1906? A. Yes.

Q. What would you say was the reasonable charter value of the steamer "Meteor" per day, the owners furnishing the crew and paying for the expenses of maintenance and provisioning the men, the charterer to furnish coal, during that period?

A. I should say between \$250 and \$260 per day.

Q. That would be based upon the theory of how many trips between here and Portland per month?

A. One trip a month.

Q. Of course, if there were more trips that could be gotten in by more rapid work, and so forth, the value would be greater, would it not?

A. Yes, the quicker she can make the voyage the more she will be worth. Well, I want to amend that

(Deposition of George E. Page.)

a little. She is worth so much per day to the owner, no matter what she does. They are supposed to get a certain amount of money per day. The question of value depends to whom it applies, whether it applies to the man who has her chartered or the man who has the ship.

Q. Then your testimony is simply with reference to the value in the charter market, \$250 to \$260?

A. Yes, sir.

Cross-examination.

Mr. HENGSTLER.—Q. What is her present value in the charter market, Mr. Page?

A. I do not believe that that vessel is worth much more than \$200 to \$225. It depends on the kind of voyage she is going on. [114] If, for instance, if you wanted to get that ship for Panama—that is, for outside business, they might get more, a good deal more; in fact, they could get a charter to Panama to-day, whereas it would be impossible to get a charter on the coast for lumber because she is not well adapted for the lumber business.

Q. She is not well adapted for the lumber business?

A. I don't think she is unless they have changed her, and I do not think they have.

Q. She also carries coal, does she? A. Yes.

Q. What is her charter value for carrying coal?

A. Do you mean the same kind of charter, or do you mean the Government form, or what?

Q. Do the forms of charter make a difference?

A. You mean if she is chartered for coal to somebody else?

(Deposition of George E. Page.)

Q. Yes. A. And on the same conditions?

Q. I don't know what you mean by the same conditions.

A. I mean if chartered on the Government form, for some outsider, for coal?

Q. Yes, tell us that way first.

A. Coal from where, from Puget Sound?

Q. Yes, from any port on the Puget Sound. She is a coasting steamer, is she not? A. Yes.

Q. She does not run over to Australia, does she?

A. No. That is a hard proposition to get at but I should say around \$175.

Mr. DENMAN.—Q. That is to-day you mean?

A. Yes.

Mr. HENGSTLER.—Q. How much would it have been in October [115] and November, 1906? Would it have been the same or would it have been a different sum for a coal charter?

A. If a person had to charter her for coal, the conditions of the market would depend entirely upon that, if there had been other coal coming down, and it would be hard to say what the value would be. The coal question is a very difficult question to answer for the simple reason that all the coal that is brought to this market from British Columbia is brought down in foreign bottoms. Coal that is brought down from Puget Sound is brought down by the owners of the vessels. That was the Pacific Coast Company. I don't know what the Pacific Coast Company was carrying at that time, but that would be about the only one that would bring coal

(Deposition of George E. Page.)

down to San Francisco. It is a difficult proposition to answer as to what her value would be at that time. There are no charters in the market except to those engaged in the business.

Q. It would be considerable less than it would be for a lumber charter?

A. Yes. I don't think they could charter for coal for the same value that they could charter for lumber for at that time.

Q. What kind of cargoes was the "Meteor" built for?

A. She was built on the Lakes, as I understand it; I don't know what she carried.

Q. Was she fit to carry general cargoes, general merchandise?

A. From recollection I should say she was not built for that purpose.

Q. Do you know whether she has been used for that purpose? A. I don't think very much.

Q. You don't know?

A. I think she has been chartered to Alaska, I think she was at one time. [116]

Q. For the purpose of carrying general merchandise?

A. I think so, though I would not swear to it.

Q. Have you ever chartered her yourself in your business?

A. I don't know; I don't recollect that we ever have. I don't remember.

Q. You don't remember that?

A. No, I have tried to many times.

(Deposition of George E. Page.)

Q. You have tried to many times?

A. Yes, sir.

Q. For what kind of cargoes?

A. We have had different inquiries on the coast, that we tried to get her into.

Q. For general cargoes?

A. No, I would not say it was for general cargo. It might have been lumber, or possibly coal, or something of that kind.

Q. Does the charter value depend upon the kind of charter that is made between the owner and the charterer?

A. No, I should not think so—you say between the owner and the charterer?

Q. Yes.

A. No, I don't think so. If she is sound and in good condition for business and adapted to the business required, that is one thing; of course, if she was not laid between decks, and all of that sort of thing, she would not be fit for merchandise. She might damage a cargo, and somebody might not want to handle her on that account.

Q. You said a little while ago when you were answering the question in regard to her coal carriage, you wanted to know whether it would be under a Government form of charter or under another charter; in what respect did that make any difference?

A. I just wanted to get what I did to figure it out. If I chartered the "Meteor" to bring coal down here and I paid \$2.00 a ton to give so much, a lump sum,

(Deposition of George E. Page.)

and she earns so much a month. [117]

Q. Would it make any difference if she is engaged in carrying lumber whether it is a Government charter or otherwise?

A. In the Government form the owner pays for the crew and the crew's provisions and the engine stores; the charterer pays for the coal, loading and discharging of the ship, and all port charges.

Mr. DENMAN.—Q. And your figure of \$250 to \$260 a day had reference to this form of charter?

A. Yes.

Mr. HENGSTLER.—Q. How did you arrive at the sum of \$250 to \$260—did you just figure that out roughly?

A. I figured it that the market value at that time for lumber was about \$8.00 a thousand, between \$8.00 and \$9.00 a thousand for sailing vessels, and I suppose steams were getting the same as the sailing vessels at that time; and the charterer went into the market and paid \$8.00 a thousand for what she carries, about 1700,000; I figured it would leave the owner in the neighborhood of \$250 to \$260 a day for the ship.

Q. You know the carrying capacity of the "Meteor" do you? A. Yes.

Q. Mr. DENMAN.—And it appears in the record elsewhere.

Mr. HENGSTLER.—That is all.

Mr. DENMAN.—That is all. [118]

**[Certificate of U. S. Commissioner to Deposition of
George E. Page, etc.]**

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, Francis Krull, a United States Commissioner for the Northern District of California, do hereby certify that in pursuance of the stipulation for taking the foregoing deposition of said George E. Page, the deposition of said George E. Page was taken before me, on Monday, October 16, 1911, at the hour of 10 A. M. at the office of William Denman, Esq., 454 California Street, in the City and County of San Francisco, State of California; that at the taking of said deposition I was attended by William Denman, Esq., Attorney for the libelant above named, and by L. T. Hengstler, Esq., attorney for the claimant above named, and by the said witness, George E. Page, who was of sound mind and lawful age, and that the witness was by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in said cause; that said deposition was by stipulation of the attorneys for the respective parties hereto taken in shorthand by Charles R. Gagan and afterwards reduced to typewriting; that the reading over and signing of said deposition of the witness was by the aforesaid stipulation expressly waived.

I further certify that I have retained the said deposition in my possession for the purpose of sealing and delivering the same with my own hand to

the clerk of the United States District Court, in and for the Northern District of California, the Court for which the same was taken.

I further certify that I am not of counsel nor attorney for any of the parties in the said deposition and caption [119] named, nor in any way interested in the event of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto subscribed my hand at my office in the City and County of San Francisco, State of California, this 25th day of October, 1911.

FRANCIS KRULL, [Seal]

U. S. Commissioner, Northern District of California,
at San Francisco.

[Proceedings Had Saturday, October 28, 1911.]

Saturday, October 28th, 1911.

Mr. DENMAN.—I will offer in evidence the depositions of Frank Walker, C. W. Wiley, and C. F. Thorndyke, taken in Seattle before N. W. Bolster, and the cause is to be submitted on these depositions, and the testimony of Mr. Page, heretofore taken. The testimony of Mr. Hough is to be omitted from the record. That is my understanding with Dr. Hengstler. It is stipulated that Dr. Hengstler shall have his brief filed within a week from to-day, and Mr. Denman shall file his authorities within two days thereafter. The case is to be submitted by November 7th.

[Endorsed]: Filed Oct. 25, 1911. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. (For further endorsement etc., see Report of Commissioner on Damages, etc.) [120]

*In the District Court of the United States, in and for
the Northern District of California.*

GLOBE NAVIGATION COMPANY, LIMITED,
a Corporation,

Libelant,

vs.

Tug "ADA WARREN," Her Tackle, Apparel and
Furniture,

Respondent.

**Notice of Taking Depositions of Frank Walker, C.
W. Wiley and G. F. Thorndyke De Bene
Esse.**

To the Claimant Warren Improvement Company,
and to Its Proctor, Louis T. Henstler, Esquire :

You, and each of you, will please take notice that the depositions of Frank Walker, C. W. Wiley and G. F. Thorndyke will be taken *de bene esse* on behalf of the libelant, before N. W. Bolster, notary public, county of King and State of Washington, *State of Washington*, in room four hundred and sixteen, Globe Building, Seattle, State of Washington, on Tuesday, the 19th day of April, 1910, at eleven o'clock A. M., that each of said persons is a necessary witness for the libelant, that each lives in Seattle, State of Washington, a greater distance from the place of trial than one hundred miles, to wit, over five hundred miles, and out of the district of the place of trial, to wit, San Francisco, in the Northern District of California.

WILLIAM DENMAN,

Proctor for Libelant.

Receipt of a copy of the within notice of taken depositions is hereby admitted this 15th day of April, 1910. Previous receipt [121] of copy of said notice on April 2, 1910, admitted.

LOUIS T. HENGSTLER,
Proctor for Claimant. [122]

*In the District Court of the United States, in and for
the Northern District of California.*

GLOBE NAVIGATION COMPANY, LIMITED,
a Corporation,

Libelant,

vs.

Tug "ADA WARREN," Her Tackle, Apparel and
Furniture,

Respondent.

**Depositions of Frank Walker, C. W. Wiley and G. F.
Thorndyke.**

BE IT REMEMBERED that pursuant to the notice hereunto annexed, on this 19th day of April, 1910, at 11 o'clock A. M. on said day, at room four hundred and sixteen, Globe Building, Seattle, State of Washington, before me, N. W. Bolster, notary public, in and for the State of Washington, residing at Seattle, personally appeared Frank Walker, C. W. Wiley and G. F. Thorndyke, witnesses produced in behalf of the libelant in the above-entitled action now pending in said court, who being by me first duly sworn, were then and there examined and interrogated by H. R. Clise, Esq., of counsel for said libelant, and by W.

H. Bogle, Esq., of counsel for said respondent, and testified as follows:

Mr. CLISE.—I want to know if you will allow me to put in the particular average statement and stipulate that it was made up from the original vouchers, and that it is a true statement of the specifications for repairs, and let it go in evidence; [123] otherwise I will have to introduce separate copies as exhibits. I thought maybe that you would stipulate that this is a true statement made up from the original vouchers furnished by Mr. Thorndyke.

Mr. BOGLE.—I don't know whether I am authorized to do that or not. The instructions I have is to cross-examine these witnesses.

Mr. CLISE.—If you will stipulate that that was prepared by Johnson & Higgins from original vouchers furnished them by the Globe Navigation Company, Limited.

Mr. BOGLE.—Was this made up after the repairs were made?

Mr. CLISE.—Yes.

Mr. BOGLE.—I think you had better introduce them. I am a little afraid to stipulate.

Mr. CLISE.—I want to introduce it in evidence, but I have not got the witness here to prove the signature of Johnson & Higgins.

Mr. BOGLE.—I will have no hesitation in admitting that this is the genuine signature, if that will suit you.

Mr. CLISE.—I offer in evidence then the statement of Particular Average & Protection Claim of

(Deposition of Frank Walker.)

the steamship "Meteor," in so far as it relates to the claim on account of the damage occurring by the collision between the steamship "Meteor" and the tug "Warren," which was signed by Johnson & Higgins on February 20, 1907.

(Statement received in evidence and marked Libelant's Exhibit "A.") [124]

[Deposition of Frank Walker, for Libelant, in Case No. 13,602, Globe Nav. Co. v. Tug "Ada Warren."]

FRANK WALKER, produced as a witness in behalf of libelant, being first duly cautioned and sworn, testifies as follows:

Q. (Mr. CLISE.) State your name, age, residence and occupation.

A. Frank Walker; I will be forty-four years of age next May; my residence is Seattle and my occupation is marine surveyor.

Q. How long have you been a marine surveyor?

A. Twelve years.

Q. Were you engaged as marine surveyor on the steamship "Meteor" when she came to Seattle in October, 1906? A. I was, yes.

Q. Did you examine her at that time to see what injuries she was suffering from?

A. What date was that?

Q. October, 1906.

A. I made a report on the ship, I could not swear to the exact date unless I saw the report.

Q. Will you examine Libelant's Exhibit "A" and

(Deposition of Frank Walker.)

see if it contains your report made at that time (showing).

A. Yes, sir; I made a survey in Tacoma, October 18, 1906.

Q. Is that a true copy of the report which you made at that time; look it over and see.

A. Yes, sir, I remember the report very well, that is a copy of it.

Q. State what injuries the vessel was suffering at that time.

A. Well, there were twelve shell plates forward, dented and two small doubling plates all more or less dented and buckled; there were eleven channel frames in the fore peak and four frames abaft the collision bulkhead that were on the port side badly bent; the stringers were bent and buckled; breast hooks were bent and buckled; the collision bulkhead was disturbed and the rivets started; the hawse-pipe was forced up through the deck and partly broken; the panting beams were adrift, and about five hundred rivets started in them; the [125] shank of the port bower anchor was badly bent. This gives it in detail here; mostly specifications for the repairs drawn up by myself.

Q. Were the specifications for the repairs drawn up by you? A. Yes.

Q. Is there a copy of the specifications there?

A. Yes.

Q. On what pages are they?

A. The specifications commence at page 23 and run to page 28.

(Deposition of Frank Walker.)

Q. And you said those specifications were prepared by yourself? A. Yes, sir.

Q. Do you know to whom the contract for making those repairs was let?

A. The Standard Boiler Works.

Q. Where were those repairs made?

A. Partly or principally in Seattle, and finished at St. Helens on the Columbia River. I made my final certificate stating that they were completed at St. Helens on November 15, 1906.

Q. Is that certificate also contained in Libelant's Exhibit "A"?

A. That certificate is also contained in Libelant's Exhibit "A."

Q. At page what? A. Page 29.

Q. I hand you two bills of the Standard Boiler Works for those repairs; they appear to be, each of them, O.K.'d by yourself; is that your signature (showing)?

A. That is my signature. I remember O. K.-ing those bills.

Q. Do you remember what the contract price for making those repairs was?

A. The contract price for making those repairs was \$9,875.00, as stated here, and also in the bids contained in this exhibit on page 30. [126]

Q. Is that a true and correct copy of their bid?

A. That is a correct copy of the bid as far as I can remember.

Q. On that bill there appears to be certain extras

(Deposition of Frank Walker.)

charged; will you explain how those happened to occur?

A. Those were incurred by the work being completed on the Columbia River, necessitating the men being sent from Seattle to St. Helens and Rainier, the traveling expenses of the men, lodgings and board of the men and extra time taken to complete the repairs by working nights, to get the ship away on time.

Q. Do you know why the vessel was sent from Seattle to Rainier before she was completed?

A. As she was chartered—if I remember right, she was chartered to load at a certain date and must be at Rainier to commence loading.

Mr. CLISE.—I offer in evidence these bills of the Standard Boiler Works for the repairs mentioned in the libel.

(Bills received in evidence and marked respectively Libelant's Exhibits "B" and "C.")

Q. I call your attention to one item of \$34.80, which appears there for "removed, faired and returned"; what was the occasion of that expense?

A. It was mentioned in the survey report "shank of port bower anchor badly bent"; that was the way I found the shank of the port bower anchor and I recommended it to be faired—this damaged anchor which is not included in the specifications—I recommended it to be straightened, if possible, and if not a new anchor of the same design and material and weight to be furnished and installed. That was not included in the specifications, but the people who had

(Deposition of Frank Walker.)

the contract for making the [127] repairs undertook to straighten it and undertook to fair the anchor, which they did, at a cost of \$34.80.

Q. Is that the reasonable cost of making that repair?

A. Yes. I thought it was impossible to repair it at first.

Q. You do not know anything, personally, in regard to how those injuries to the vessel occurred, other than what you have been told?

A. No, only what I have been told; only upon the statement made by the master of the vessel and what I took from the vessel's log—from her log-book I found the damage was alleged to be the result of a collision with the tug "Warren."

Cross-examination.

Q. (Mr. BOGLE.) Mr. Walker, how did the "Meteor" come from San Francisco to Seattle—under her own steam?

A. Under her own steam, with temporary repairs made to her bows.

Q. Do you know when she reached Seattle?

A. She arrived in Tacoma October 18th, where I first made the survey of her.

Q. When were the repairs completed?

A. The repairs were completed November 15th; the report of the survey is signed on November 15, at St. Helens.

Q. In the meantime she had gone from Seattle to St. Helens during the time the repairs were being made?

(Deposition of Frank Walker.)

A. Yes. She was very nearly completed in Seattle, and then was in such a seaworthy condition that she could go down to the Columbia River and complete the remainder of the repairs in that port.

Q. You spoke of her having a charter party that she had to meet at St. Helens; you do not know of your own knowledge about that, do you?

A. All I know about that is as I heard it in the office at the [128] time from Mr. Thorndyke, the manager.

Mr. BOGLE.—I move to strike out the evidence in regard to that as merely hearsay and incompetent.

Q. Were all those repairs made necessary by some recent injury sustained by this vessel?

A. All of those repairs there were made necessary by that damage.

Q. How old was the "Meteor"?

A. I cannot give you her age right off.

Q. Was the extent of the repairs increased any by reason of her age or the decay of her material, hull and parts? A. No; none whatever.

Q. Did you let the contract with the Standard Boiler Works for this work?

A. It was let by the owners of the vessel after consulting with me.

Q. Did you consider the bid a fair one?

A. Yes; there were other bids obtained for the work.

Q. But this was the lowest bid?

A. That was the lowest bid. The next lowest was \$12,569.

(Deposition of Frank Walker.)

Q. To what extent was the vessel in a better condition after those repairs were completed than she was before the injury was sustained?

A. The vessel was in no better condition; it simply brought her back to the condition as before.

Q. Those repairs consisted in new work largely and new material?

A. Well, that would not benefit the vessel generally.

Q. (Mr. CLISE.) Were some of the old plates repaired and put back?

A. Yes, sir; it states here—I cannot say exactly how many new plates were put in. It was left to the contractor, if possible, to fair the plates and return them, and if not to renew them. [129]

Q. Is a plate that was faired and put back, as strong as a new plate?

A. For that purpose it would be equally as good as a new plate.

Q. (Mr. CLISE.) Among your duties as marine surveyor, as I understand you, you were compelled to superintend this work on the boat during the time the repairs were being made.

A. I did; yes, sir.

Q. Now, why were the banked fires kept under the boiler?

A. Because I made the arrangement, in the first place, with the contractor to lift the plates for him by steam, which had to be done by steam, and as she was taken to a dock where there was no crane and no facilities for lifting them. That was partly the

(Deposition of Frank Walker.)

reason; the other part of the reason was that the open plates removed from the vessel were so close to the water line that we kept steam up for safety sake.

Q. Was this taken into consideration by the contractors at the time they made their bid?

A. It was taken into consideration by the contractors at the time they made their bid. The contractors asked me if I could arrange to have the plates lifted for him, and I said yes, that I would arrange to have them lifted for him, and he said, "Then, that is my bid."

Q. And that was the reason why the banked fires were kept?

A. That was the reason why the banked fires were kept; there were two reasons, for safety sake and for to facilitate the repairs. For instance, one day we would lift three or four plates and then they would be idle perhaps a day and the next day or so afterwards there would be another plate lifted.

Q. Was there a donkey-engine on board?

A. No donkey boilers, only the main boilers. [130]

Q. (Mr. BOGLE.) Is seven tons a day a reasonable amount of coal to use for that purpose?

A. Yes.

Q. How much does she consume; how many tons of coal? A. On her daily runs?

Q. Yes.

A. From twenty-three to twenty-four tons; it varies according to the nature of the coal we get.

Q. (Mr. CLISE.) What are the crew doing dur-

(Deposition of Frank Walker.)

ing the time that those repairs were being made?

A. The engine-room crew were keeping up steam and making a general overhauling of the machinery preparing for the next voyage; the deck crew were cleaning and painting in the holds and preparing for the next voyage, that is, a number of the deck crew, with the junior officers. The master of the ship visited and supervised his officers generally; the day watchman was with the crew and the night watchman kept watch at night. The steward cleaned up and looked after his department preparatory for the next voyage.

(Testimony of witness closed.)

FRANK WALKER.

[Deposition of C. W. Wiley, for Libelant, in Case No. 13,602, Globe Nav. Co. v. Tug "Ada Warren."]

C. W. WILEY, produced as a witness in behalf of libelant, being first duly cautioned and sworn, testified as follows:

Q. (Mr. CLISE.) State your name, age, residence and occupation.

A. C. W. Wiley; forty years old, and my residence is Seattle, and my business is marine superintendent of the Boston Towboat Company. [131]

Q. How long have you lived in Seattle?

A. Between seven and eight years.

Q. How long have you been in your present position? A. About fourteen years.

Q. Do you operate any vessels on the Sound?

A. Yes, sir.

(Deposition of C. W. Wiley.)

Q. Were you operating vessels in September, 1906? A. Yes.

Q. And October? A. Yes.

Q. Were you acquainted with the reasonable wages and subsistence for men and for the crew on board a steamship such as the "Meteor" during that time?

A. Yes, sir.

Q. Did you hear Mr. Thorndyke's testimony as to the wages paid the various men who were on the steamship "Meteor" at that time, and the subsistence that was allowed them? A. Yes.

Q. Were the various sums he stated reasonable, in your opinion?

A. They were practically the going wages of the port, what we all paid under similar conditions.

Q. Is it usual or customary where a vessel is laid up for repairs consuming a period of not more than fifteen days, to retain certain of the officers and men on board such as were retained in this instance?

A. It has always been the custom of our company to do so, and most, the majority of the steamship companies do the same thing. We never discharge the officers; we never discharge anyone except the sailors and firemen, unless we were going to lay up for a month.

Cross-examination.

Q. (Mr. BOGLE.) Mr. Wiley, the Boston Tow-boat Company operated the "Hyades" and the "Lyra" and the "Pleiades"? A. Yes. [132]

Q. They are larger boats than the "Meteor"?

A. Slightly; yes.

(Deposition of C. W. Wiley.)

Q. What does it cost for subsistence of the officers and crew on those boats?

A. Well, the way our company figures it on the Pacific Coast, usually sixty cents per day per man for every day while they were at sea.

Q. Officers and crew?

A. Yes, an average of sixty cents.

Q. What is the custom when the vessel is in port as to furnishing subsistence to the officers and crew?

A. Since the ships have been in the Pacific Coast—the Coast trade on the Pacific Coast, we close up the galleys the day they arrive in port and have allowed the men sixty cents a day, and we allowed the chief engineer and the captain a dollar a day on our companies.

Q. Is that the usual rate allowed?

A. I always understood that our rate was higher in the case of the men, but lower in the case of the officers. We do not go quite the scale that the union demanded for the officers.

Q. You allowed the master and chief engineer a dollar a day? A. Yes.

Q. And everybody else sixty cents?

A. Sixty cents a day—what the actual cost was to us.

(Testimony of witness closed.)

C. W. WILEY. [133]

[Deposition of G. F. Thorndyke, for Libelant, in Case No. 13,602, *Globe Nav. Co. v. Tug "Ada Warren."*]

G. F. THORNDYKE, produced as a witness in behalf of libelant, being first duly cautioned and sworn, testifies as follows:

Q. (Mr. CLISE.)—Mr. Thorndyke, state your name, age, residence and occupation?

A. G. F. Thorndyke; age, forty-four; residence, Seattle, and I am in the shipping business.

Q. Are you an officer of the Globe Navigation Company? A. Yes, sir.

Q. What office do you hold?

A. At present, manager.

Q. How long have you been in the employ of the Globe Navigation Company?

A. Three years as manager. I have been with the Globe Navigation Company since 1901.

Q. In what capacity were you with the Globe Navigation Company, Limited, in the year 1906?

A. Officially, Traffic Manager, but authorized to have general supervision and superintend the business.

Q. When the "Meteor" came to Seattle in October, 1906, after having been damaged at San Francisco, did you superintend the letting of the contract for her repairs? A. I did.

Q. Did you employ Mr. Walker as marine surveyor? A. Yes.

Q. In calling for bids for those repairs, did you obtain bids from more than one party? A. Yes.

(Deposition of G. F. Thorndyke.)

Q. And to whom did you let the contract for the repairs? A. The Standard Boiler Works.

Q. Was the contract let upon the specifications as appears in Libelant's Exhibit "A" from page 23 to page 28? A. Yes, sir.

Q. Were the repairs made in accordance with those specifications? A. They were.

Q. I show you Libelant's Exhibits "B" and "C" and I will ask you if [134] you actually paid the Standard Boiler Works the sums of money that appear thereon for the work enumerated in those exhibits? A. We did, yes.

Q. And is the signature there the signature of the Standard Boiler Works on the receipt for the money?

A. Yes.

Q. From the time the vessel was making those repairs, what crew did you have?

A. A crew of fourteen men, including the officers.

Q. Enumerate them.

A. Captain, mate, 2d mate, 3d mate, chief engineer, 1st assistant engineer, 2d assistant engineer, 3d assistant engineer, three oilers, a day watchman and night watchman, and steward.

Q. How many days was she in making those repairs? A. Fifteen.

Q. What was the daily wages that you paid to each of those various men, and what was their daily subsistence?

A. The captain, wages, \$5.50, subsistence, \$1.25; mate, \$3.00, subsistence, \$1.00; 2d mate, \$2.50, subsistence, \$75; 3d mate, \$2.17, subsistence, \$75; chief

(Deposition of G. F. Thorndyke.)

engineer, \$5.00, subsistence, \$1.00; 1st assistant engineer, \$3.00, subsistence, \$.75; 2d assistant engineer, \$2.50, subsistence, \$.75; 3d assistant engineer, \$2.17, subsistence, \$.75; three oilers, \$1.66 $\frac{2}{3}$ each, and subsistence, \$.60; watchman, \$1.66 per day, subsistence, \$.40; watchman, \$1.66 per day, subsistence, \$.40; steward, \$2.00, subsistence, \$.60.

Q. How long have you been in the steamship business? A. Twenty-six years.

Q. Where? A. On Puget Sound.

Q. Is that a reasonable sum to be allowed those men for wages and subsistence? A. It is. [135]

Q. Were there any other expenses incident to the vessel during the time those repairs were being made? A. Yes.

Q. What were they? A. Expenses for fuel.

Q. How much was that a day?

A. Seven tons a day, at \$3.75 a ton, making a total of \$26.25 a day.

Q. Anything else?

A. Those comprise the expenses; there was a loss of profit.

Q. What was the estimated amount of loss of profit during that time?

A. Estimated amount of profit, over \$197.18 a day.

Q. How do you arrive at that figure?

A. Taking the six consecutive trips prior to and including the time of the accident, as a basis.

Q. That is the way you arrived at the average daily profit during the time that she was making those repairs? A. Yes.

(Deposition of G. F. Thorndyke.)

Q. Was the "Meteor" under charter to any other party for the trip immediately succeeding the one on which she was injured? A. Yes, sir.

Q. To whom?

A. Charles R. McCormick of San Francisco.

Q. Was that charter-party in writing?

A. It was.

Q. I will ask you if that was the charter-party for the voyage immediately succeeding the time at which she was injured? (Showing.)

A. That is the one.

Mr. CLISE.—I offer that in evidence.

(Charter-party received in evidence and marked Libellant's Exhibit "D.")

Q. Did you have other charters tendered to you at the same time? A. I had.

Q. From whom and what for? [136]

A. I was offered a cargo of coal from Seattle to Portland which I could have taken had it not been for the necessary repairs which were incident to the collision, and which I had to decline.

Q. You say you had to decline this?

A. I had to decline the coal cargo.

Q. If the vessel had not been delayed by reason of the accident in San Francisco, would you have been able to have taken that charter offer?

A. I believe I would.

Q. Was the vessel delayed in San Francisco by reason of the accident? A. She was.

Q. How long? A. Two days.

Q. Did she have a full cargo on at that time?

(Deposition of G. F. Thorndyke.)

A. Yes, sir.

Q. What was the daily expense of the two days in San Francisco, that she was delayed there by reason of the accident?

A. This memorandum does not show that.

Q. Haven't you got anything which will show that?

A. Nothing more than the profit of those two days.

Q. Would your estimate of the profits of those two days be the same as the estimate given already?

A. It would be the same as the estimate already given you.

Q. What crew would you have on, in addition to those whom you have already named?

A. We would have sailors and waiters and firemen.

Q. How many?

A. Probably six or eight sailors.

Q. And how many firemen?

A. Three firemen and three or four mess boys.

Q. And what would be the reasonable compensation for the firemen? [137]

A. \$1.66 $\frac{2}{3}$ a day per man.

Q. What would be the reasonable subsistence for those men? A. \$.60 daily.

Q. What would be the reasonable compensation for the sailors? A. \$1.17 $\frac{2}{3}$ per day.

Q. And subsistence? A. \$.40 cents a day.

Q. And for the waiters?

A. \$1.00 a day and subsistence \$.40.

Q. This is a steam vessel? A. Yes.

Q. Does not a steam vessel carry coal-passers?

(Deposition of G. F. Thorndyke.)

A. Yes.

Q. Were there any coal-passers? A. Yes.

Q. What is their reasonable compensation?

A. Three coal-passers, compensation would be \$45. a month—\$1.50 a day, each.

Q. And subsistence?

A. \$.60; and there were also three cooks.

Q. What is their reasonable compensation?

A. \$75 for the chief cook, \$50 for the 2d, and \$40 for the 3d; subsistence \$.60 for the chief cook and \$.40 a day for the others.

Q. Why was the vessel detained those two days in San Francisco?

A. Putting a patch on her bow to make temporary repairs so that she could proceed to Seattle and deliver her cargo.

Q. Did she have a cargo on board at the time?

A. Yes.

Cross-examination.

Q. (Mr. BOGLE.)—What was the date of the accident in San Francisco?

A. The 11th of October, 1906.

Q. When did she leave San Francisco for Seattle?

A. I should say the 14th; two days later.

Q. You say she had a cargo aboard at the time of the accident?

A. Yes, sir, for the Selby smelters. The accident was in San Pablo Bay and she had ore on board.

[138]

Q. What amount?

A. I would say twelve hundred tons.

(Deposition of G. F. Thorndyke.)

Q. And she was going where?

A. She was proceeding then to sea.

Q. On her way to Seattle?

A. On her way to Puget Sound, yes.

Q. And she actually left on the 14th, you say?

A. Yes.

Q. And she got here when?

A. She arrived in Tacoma on the 18th.

Q. Now, when did she leave the Sound for St. Helens? A. On the 6th of November.

Q. What days make up the fifteen days repairs which you have there?

A. We delivered her to the contractors at Chesley's dock on the 21st of October, and got her back from them again on the 6th of November, constituting just fifteen days.

Q. That includes the time that she was on the Sound?

A. No; she went to Tacoma first and discharged some cargo there and went to Everett and discharged her balance and then proceeded direct to Chesley's dock here; she had no cargo for Seattle.

Q. And the time commenced running on her arrival at Chesley's dock? A. Yes, sir, on the 23d.

Q. And the fifteen days expired when she came out of that dock? A. Yes.

Q. Was she put on drydock for those repairs?

A. No.

Q. Was it necessary to keep banked fires during the time she was undergoing those repairs?

A. Yes.

(Deposition of G. F. Thorndyke.)

Q. For what reason?

A. Well, I don't know, except that it is customary to keep banked fires when you have the crew on board; her engines were all in order and her boilers able to perform their usual functions.

Q. But you were not using the boilers or engines in any way?

A. I could not state positively whether or not we did not use the [139] boilers for the purpose of steam at times, for the use of the contractor.

Q. There was no provision in your contract with the contractors that you were to furnish them steam?

A. No.

Q. Do you conceive of any reason for keeping your fires going on the steamer during those fifteen days?

A. Yes, as a precaution, to have the vessel in readiness to move if we wanted to.

Q. You could not move if those plates were being taken out and replaced.

A. Yes, she was afloat; the repairs were all above the water-line.

Q. She was in her dock, in a safe place?

A. Yes.

Q. Well, what was the reason for keeping up steam then?

A. None other that I can think of now, except that it is usual. We do not blow down the boilers unless we are washing the boilers or making repairs on them, when we lay up for a few days like that, or two weeks.

Q. There was no real necessity for it, so far as

(Deposition of G. F. Thorndyke.)

you can see, was there?

A. Well, I could not state positively now as to that; there may have been, that is some four years ago, Judge.

Q. Mr. Thorndyke, what were the wages of the master at that time?

A. At the rate of two thousand dollars a year; about five dollars fifty cents a day.

Q. And you boarded him on board the ship?

A. No.

Q. You boarded him out?

A. We boarded him ashore; allowed him the regular subsistence which the harbor regulations require, \$1.25 a day—all the men were boarded ashore.

Q. Are those subsistence allowances which you have mentioned regulated [140] in any way by any port regulation or custom here?

A. Yes, sir, port regulation.

Q. What regulation?

A. It is the custom, for the master \$1.25 a day.

Q. Does that include the entire time that the ship is in port?

A. The entire time that he is under employ for the company and boarded ashore.

Q. You say there is some regulation that controls it, or custom; does that custom extend to all the master's time in port?

A. It did with our company, and I think it does with all.

Q. All of the crew of a vessel in port are boarded ashore at the expense of the ship.

(Deposition of G. F. Thorndyke.)

A. Some companies, not always with us; sometimes with us. The Pacific Coast always put their crews ashore and board them ashore at their home port.

Q. Has it been the custom with your company in any instance except this?

A. Oh, yes, repeatedly; it is economy; it gives a chance to clean up the galleys and things like that. We oftentime board our crews ashore.

Q. None of those officers were aboard the ship on duty during the time of those repairs, were they?

A. Yes.

Q. Which ones?

A. Well, I should say all those men that I have enumerated were by the vessel eight or nine hours a day.

Q. In addition to all those officers, did you keep watchmen on board the ship? A. Yes.

Q. None of the officers stood watch then?

A. No, not in particular.

Q. They had no duties to perform at all.

A. Yes, naturally. [141]

Q. Well, what?

A. Well, lying pretty close to Stetson-Post Mill, in order to keep the ship in order from cinders and soot, the deck officers would have considerable to do around the deck; the engine force would be busy below.

Q. And you kept four engineers aboard?

A. Yes.

Q. They were not employed at anything, were they?

(Deposition of G. F. Thorndyke.)

A. Yes; they put in their eight or nine hours; they put in nine hours a day.

Q. What were they doing?

A. I could not say in detail exactly what they were doing, but anything that came up to do.

Q. And you kept the master and three mates aboard under full pay and full subsistence.

A. Yes, sir, we did in that case, Judge Bogle, as we would in our own case or any other; we would not want to discharge good officers, to dismiss them from the service and take chances of losing them for a lay-up of ten days or two weeks, and we were compelled to lay up because of this collision, and we kept those men by, as we did in the case of any occurrence where we lay the vessel up for ten days or two weeks or twenty days.

Q. There is a custom that officers are put on half pay when the vessel is out of service a while.

A. Yes, that usually obtains if the vessel is lying in port thirty days or more.

Q. Were those subsistence allowances actually paid by you to the parties with whom the crew boarded, or did you pay them to the crew?

A. We paid it to the crew.

Q. And they boarded where they pleased?

A. They boarded where they pleased. [142]

Q. Most of them boarded on board the ship, didn't they? A. No.

Q. None of them boarded on board the ship?

A. No.

Q. Mr. Thorndyke, you say that this vessel's profits averaged \$197.74 a day, is that your estimate?

(Deposition of G. F. Thorndyke.)

A. Yes.

Q. What do you base it on?

A. I took the reports for the six consecutive trips.

Q. Have you got those reports? A. I have.

Q. Will you let me see them, please?

(Witness hands documents to counsel.)

Q. When were those reports made up?

A. Immediately after the result of the voyage was determined, or the voyage was completed—that is almost immediately afterwards.

Q. Mr. Thorndyke, did you furnish a statement of the earnings of this vessel for one hundred and fourteen days between June 30th and the date of the accident to the attorneys for the respondent, and is this a copy of the statement which was furnished to the respondent in this case (showing)?

A. I think likely; I guess it is.

Q. I will ask you to look at the paper I now hand you and I will ask you whether you furnished that data. A. Yes, I did.

Q. I notice that you state there that the earnings were \$130 a day; whereas your testimony now is that it was \$197.17. A. That is correct.

Q. What is the explanation?

A. The explanation is that in this report I contemplated insurance, maintenance and depreciation as an operating expense; as a fixed charge.

Q. Then when you speak of \$197.17 a day, that includes insurance, maintenance and depreciation, does it?

A. Well, that includes the fixed charge of those items. [143]

(Deposition of G. F. Thorndyke.)

Q. It is not all profit, then?

A. Well, yes; if they make those items back it is all profit; if they restore this expense to us then it gives us that much more.

Q. What you really mean is that the \$197.17 is the gross earnings, in excess of the operating expenses, not including insurance, maintenance and depreciation.

A. Yes, that is it; gross earnings of the steamer deducting the operating expenses.

Q. You said that you had a charter-party with Charles R. McCormick & Company? A. Yes, sir.

Q. You did not lose that charter-party by this accident, did you? A. No; it is here in evidence.

Q. You carried it out afterwards?

A. We carried it out afterwards, yes.

Q. You say that you could have gotten a cargo from Tacoma to Portland except for this accident?

A. Yes.

Q. Is it not a fact, Mr. Thorndyke, that you had asked Mr. McCormick for permission to carry that cargo and he declined, and would not consent to it?

A. Yes, that is a fact, he declined.

Q. He declined before the accident?

A. No, it is my recollection that it was afterwards.

Q. Can you refresh your recollection about that?

A. Yes, I have a telegram, I think.

Q. Now, is it not a fact—

A. (Continuing:) I think the coal was offered while the vessel was repairing here; I may be wrong as to that, but I was under that impression.

(Deposition of G. F. Thorndyke.)

Mr. CLISE.—I will tender you, if you desire it, a telegram from Mr. Baxter, who was our agent in San Francisco, which explains [144] the reason of Mr. McCormick's refusal, if you desire it (showing).

Mr. BOGLE.—I have a copy of that here, Mr. Clise.

Q. I will ask you if you were not advised by your agent in San Francisco on October 11, the day of the accident, that it was very doubtful whether Mr. McCormick would grant permission to take the coal from Tacoma to the Columbia River, in response to a request made by you before the accident?

A. I cannot testify as to that, it is too long ago.

Mr. BOGLE.—Have you the letter of October 11th (addressing Mr. Clise)?

Mr. CLISE.—Yes (handing document to counsel for respondent).

Q. (Mr. BOGLE.) I show you a letter from Mr. Baxter under date of October 11, in which he acknowledges receipt of your letter of the 8th of October requesting permission to take coal from Seattle to Portland, and states that he will see Mr. McCormick that afternoon and try to get his permission to take the coal from Tacoma to the Columbia River, but that he is not sure that Mr. McCormick will grant the same; "Mr. McCormick is in a great hurry for the vessel and she has been delayed a considerable length of time by loading up freight and he does not feel any too well towards Globe Navigation Company on account of their compelling payment of some previous bills" (showing), and I will ask you

(Deposition of G. F. Thorndyke.)

if that was not the state of the negotiations for that commission at the time the accident occurred.

A. That probably states the negotiations at that time, but I do not know that he positively declined to let us take the coal at that time. [145]

Q. Now, when you stated that you could have obtained that commission, or that you thought you could, you had forgotten the exact state of the negotiations when the accident occurred, hadn't you?

A. No, I believe if the "Meteor" had not met with the accident, and proceeded direct to Seattle, as a matter of course, the charterer would have permitted us to carry the cargo of coal to Portland. The delay here would have been immaterial.

Q. That, of course, is a mere guess of yours, isn't it?

A. Yes, based on experience in those matters.

Q. Referring to the statements of the voyages upon which you based your estimate of the earnings of \$197.17 a day, I call your attention to the first statement handed me by you, being voyage No. 48, and I will ask you what you estimated the profits for that voyage at, per day? A. \$260.52.

Q. When did the voyage begin? A. July 7.

Q. Look again. A. June 30, 1906.

Q. When did it end?

A. July 11, 1906; it consumed eleven days.

Q. And the net earnings were how much?

A. \$260.52 a day.

Q. The gross net earnings for the eleven days?

A. Something over three thousand dollars; as I

(Deposition of G. F. Thorndyke.)

have testified, treating the insurance matters as I have testified.

Q. The statement itself shows gross net earnings of \$2,220.01, doesn't it? A. Yes.

Q. How do you make up the difference between that and \$260.52 per day?

A. By adding to that the fixed charges which I have before testified about, which I do not believe should be deducted from the earnings of that voyage. [146]

Q. In other words, you have added some item for insurance and what else?

A. Insurance and depreciation and maintenance.

Q. And in getting at the per diem earnings you have included the eleven days from June 30 to July 11; now that covers the day that she sailed from Seattle, June 30, until she arrived back at Seattle, July 11, is that correct? A. Yes, sir.

Q. When did she make the next voyage?

A. Approximately immediately afterwards.

Q. Look at your report of Voyage No. 49 and state when. A. That says the 16th, the vessel sailed.

Q. Now, what have you done, in those estimates you made, with the expenses of the vessel between the 11th and the 16th of July?

A. They are included in this report.

Q. Where are they included in your figures? You say that in the first voyage you counted up from the day she sailed, June 30th, until the time she arrived back, July 11th, and she did not sail on another voyage until July 16th; there were five days that she

(Deposition of G. F. Thorndyke.)

lost in port, doing nothing and earning nothing.

A. She had to load.

Q. Have you included in any of those reports the expense of the time consumed in loading the vessel?

A. You understand this report deals only with sailings; it says nothing about the time the vessel is lying in port, as far as the memorandum on the right hand side is concerned.

Q. Please take the report of voyage 48 to which you have referred, and give me the exact figures and how you arrived at them, [147] showing the earning of \$260.52 a day from that report of voyage No. 48, give me the exact figures and how you arrive at them.

A. I deducted from the gross earnings the operating expenses of the vessel only.

Q. Give us the figures there, so that we can have it down and the court can see it.

A. I can give you a memorandum for each one.

Q. I understand you to say that the figures were all on that report there. A. They are.

Q. Well, give it to us, then.

A. Well, take the profit of \$2,220.01, add to that maintenance \$166.23, add to that insurance, \$440.05, and add to that depreciation on the book value of the vessel, \$180,000, five per cent, \$25 a day; total, something over \$3,000.

Q. After you add those together what do you divide them by?

A. Twelve days, the number of days she consumed on the voyage.

(Deposition of G. F. Thorndyke.)

Q. Then, in those estimates which you have made, the time when she lay in port between voyages is not included in your estimates at all.

A. No, she had no idle time.

Q. You stated that between voyage 48 and voyage 49 she did have from July 11th to July 16th, idle time.

A. No, I would not say that; that report simply shows that, but the expenses—

Q. You have taken the figure twelve, being the number of days included in voyage No. 48, as the amount to divide this expense by, to divide your earnings, to get the *per diem* earnings. A. Yes.

Q. Your next voyage does not start until the 16th.

A. Yes. [148]

Q. Now, you have not taken care of the time between the 11th and 16th, have you?

A. The expenses are there from the time the vessel discharged.

Q. They are not in the figures you have given the commissioner here, are they?

A. Yes; they are in the figures there.

Q. Where are they?

A. They are not in the memorandum of the days consumed.

Q. Where are the expenses between July 11 and July 16 on this voyage No. 48 report?

A. They are included in the various items there which are totalled.

Q. Look at it, Mr. Thorndyke, and see if it is not

(Deposition of G. F. Thorndyke.)

true that there is no expense item subsequent to July 11.

A. No; I cannot agree with you. The expense items are included here.

Q. Expenses up to what date?

A. For that voyage No. 48, up to the time that she was discharged.

Q. Give us the date.

A. I can give you that if you want it.

Q. That is what I want; you have the reports before you there.

A. I have to have a memorandum of them.

Q. Well, you have the report here which you furnished me, of voyage 48? A. Of earnings?

Q. Of earnings and expenses; now, what I want to know is what dates are covered by your earnings and expenses in that report?

A. The dates that are represented there.

Q. That is from June 30th to July 11th?

A. Twelve days.

Q. It does not include from July 12th to July 16th?

A. No, this does not, but the next expense is taken up on the 12th, the next day.

Q. Look at it and see—have you got the report of voyage 49?

A. I understand the same condition obtains there. The right-hand [149] column represents the sailings, and it says nothing about the time consumed in loading the cargo, which is a part of the voyage.

Q. Is it not true that the expenses of the vessel

(Deposition of G. F. Thorndyke.)

during the time she lay in port between those voyages, is not included in those reports, and that you have estimated the net earnings on the voyages alone and not including the time between the voyages when she arrived in port?

A. It does not include the time; it includes the expenses.

Q. You have stated that the expense shown on voyage 48 comes up to and includes July 11th, is that true? A. Yes.

Q. Now look at the report of voyage 49 and state if the expenses there contained do not begin on July 16th?

A. No, they do not; the expense item there refers to the performance of the vessel in the matter of earnings and operating expenses, and the other refers to her sailings only; arrivals and departures.

Q. Well, in your estimate of the earnings *per diem* you have divided it by the number of days consumed on the voyage.

A. I have taken that according to that report.

Q. You have not taken the days that she was idle in port between voyages, in estimating the *per diem* earnings, have you? A. Apparently not.

Q. Now, between voyage 48 and voyage 49 there were five days in port, were there not? A. Yes.

Q. Between voyage 49 and voyage 50 there were eleven days in port that were not included, were there not? A. Yes, according to these reports.

Q. And between voyage 50 and voyage 51 she was in port from August 29th to September 1st?

(Deposition of G. F. Thorndyke.)

A. Yes, two days.

Q. And between voyage 51 and voyage 52 she was in port from September [150] 22d to September 28th? A. Yes, six days.

Q. And between voyage 52 and voyage 53 she was in port from October 26 to November 6?

A. Yes.

Q. In making your estimate of her earnings *per diem* you have taken the number of days that she was actually on her voyage and excluded those days that they were in port?

A. Yes, apparently I did that throughout.

Q. Therefore, your statement of the *per diem* earnings and profits is erroneous?

A. To the extent that this number of days makes a difference; the *pro rata* would be the same; it would reduce the profit of \$197.

Q. Now, Mr. Thorndyke, you have arrived at this *per diem* earning by taking the gross earnings and deducting the operating expenses, adding insurance, maintenance and depreciation. A. Yes.

Q. And dividing by the number of days actually consumed in the voyage. A. Yes.

Q. For what amount was this vessel insured during that time? A. \$180,000.

Q. What was the *per diem* of insurance?

A. About thirty-five dollars.

Q. What is the item of maintenance which you spoke of?

A. Upkeep of the hull and engines and equipment and installation.

(Deposition of G. F. Thorndyke.)

Q. That is all included in your operating expenses, is it not?

A. It is shown separately on these reports.

Q. The amount is estimated by you? [151]

A. Yes.

Q. And that is an item which would have to be paid out if the vessel had been in service instead of undergoing repairs?

A. It is an annual charge, a fixed charge; it runs on annually.

Q. You are taking here the actual earnings; your estimate of what it cost you to maintain the vessel while she was making those earnings.

A. Yes; well, a maintenance is an item which does not necessarily come up while she is making those earnings and performing any one trip; it is a question of wear and tear and renewal; it is coming up all the time. I won't say that those disbursements were on account of maintenance required for those specific voyages; they were incurred at that time—expenses incurred.

Q. This item which you have added there, maintenance, was not money you spent during the time she was undergoing repairs, but your estimate of what she would have spent if she had been in service and had not been injured in this accident, wasn't it?

A. Yes, and it is averaged—it is a way of striking an average.

Q. Why should it not be deducted from your earnings, instead of being added to them, to get at your net profits?

(Deposition of G. F. Thorndyke.)

A. It had previously been deducted from the net earnings in the report. There is a maintenance charge of \$157.49, which is charged against the earnings, and that should be returned—reimbursed.

Q. How do you figure that it enters into the question of your profit; what I mean is, why should we add to the net earnings in order to get at what your net profits would have been?

A. No more than that maintenance is a fixed charge that we are [152] entitled to be reimbursed for. It goes on from month to month and year to year and while the vessel is lying idle and while she is operating it goes on, and we are entitled to be reimbursed for it.

Q. That does not represent any sum which you actually paid out while she was undergoing repairs, does it?

A. Yes, I take it so. There was \$157.49 expended for maintenance on that voyage No. 50.

Q. I understand—

A. (Continuing.) And part of that may have been incurred during the time that the vessel was laid up; deterioration of some kind or other.

Q. It would not have been during that voyage if it was incurred then; you did not spend any of this item of maintenance during the time that she was laid up, did you?

A. I cannot say as to whether we incurred any of these bills while she was laid up there.

Q. Didn't you include in the other bills of your disbursements, everything which you paid out even

(Deposition of G. F. Thorndyke.)

down to the subsistence of the officers and crew on the vessel? A. Yes.

Q. Well, then, it was not a disbursement made while she was being repaired.

Q. (Mr. CLISE.) He means at this particular time; made for this particular accident.

A. No; those trips were not made at this particular time.

Q. (Mr. BOGLE.) Your item of maintenance which you refer to, is not actual expense incurred while she was undergoing repairs, but it is your estimate of the amount of expenses, based upon a [153] year's use of the vessel, covering her repairs and maintenance, is that it?

A. No; the testimony that I have given here refers to the maintenance items which appear on these various trip sheets. I have dealt with the totals of those maintenance items in my testimony and in arriving at the average I have given.

Q. In these reports to which you have just referred, maintenance is operating expense deducted from the gross earnings in order to get the net earnings, isn't it? A. Yes.

Q. Now, in getting at your estimate of the *per diem* earnings you have taken the net earnings as shown by those reports and you have added back this operating expense item of maintenance?

A. Yes, sir, which was repairs of equipment and repairs of hull or engine, and renewal, as the case may be, and it does not include any article that we

(Deposition of G. F. Thorndyke.)

used on board the vessel or anything like that, such as stores.

Q. Now, you also added an item for depreciation?

A. Yes.

Q. And that is based on a valuation of what?

A. \$180,000.

Q. In this statement which you made up of items and which was furnished to the attorneys for the respondent in this case you give depreciation as based on the valuation of \$120,000, what is the explanation of the increase in value of this vessel from \$120,000 to \$180,000?

A. I assume in that case I fell into the error of basing it on her value in a damaged condition; the book value of the vessel is \$180,000, and it should so appear in that statement.

Q. Do you carry a depreciation on your books?
[154]

A. No, we do not carry a depreciation on the books; but our books are expeted every year or so by Price, Waterhouse & Co., or every two years, and they deduct the depreciation.

Q. Do you carry depreciation in those voyage reports which you furnished here?

A. We do not; no.

Q. You say this vessel is insured for \$180,000?

A. Yes.

Q. Is that considering the hull and machinery insurance, ship insurance?

A. That includes protection and indemnity as well.

Q. By protection and indemnity what do you

(Deposition of G. F. Thorndyke.)

mean? A. Well—

Q. Cargo losses?

A. Cargo losses, personal injuries, damages which we do to other properties and that sort of thing—I guess I am wrong—the hull and machinery is \$180,000 and the protective indemnity is \$125,000, aside from that.

Q. You mean that the “Meteor” carries marine insurance \$180,000? A. Yes.

Q. On a valuation of what? A. \$180,000.

(Letter of October 11, 1906, received in evidence and marked “Respondent’s Exhibit No. 1.”)

Redirect Examination.

Q. (Mr. CLISE.) Mr. Thorndyke, at the time of this correspondence with Mr. Baxter with reference to Mr. McCormick granting permission to carry coal from Seattle to Portland, did you have any telegram from Mr. Baxter with reference thereto?

A. Yes, sir.

Q. I hand you this telegram and I will ask you whether that was the one which you received from Mr. Baxter on the date indicated on the telegram (showing).

A. Yes. (Telegram marked Libelant’s Exhibit “E.”)

Q. And it was on the matters stated in that telegram that you [155] based the information which you gave in your answers on cross-examination referring to this voyage No. 48 and to the subsequent voyages, each one of them shows a certain number of days at sea and a certain number of days in port and

(Deposition of G. F. Thorndyke.)

the total for the voyages?

A. Yes, sir. I want to correct my testimony.

Q. In what respect?

A. My deductions were made on the basis of the time, or the average was arrived at which resulted in the number of days they were on the voyage and the days they were in port, according to that total.

Q. You mean as to the daily earnings? A. Yes.

Q. But, if the voyage sheets show a certain number of days in port between the arrival from one voyage and the going out on the next voyage, did you include those days also, or didn't you?

A. Yes, sir, according to the total there, yes; for instance, voyage No. 48 shows a total of time on the voyage and time in port at twelve days, and I divided the amount by twelve days.

Q. That shows that you arrived in Seattle on July 11? A. Yes, sir.

Q. Voyage No. 49 shows you sailed on July 16th?

A. Yes, sir; but I did not deal with that.

Q. There is five days which you remained in port?

A. I didn't deal with that. I had the expenses for a certain number of voyages covering a certain number of days which are totalled and shown on those reports; the expenses were incurred for twelve days and I divided by twelve days in that instance.

Q. So that in arriving at your daily average, you have omitted [156] then all the days which would show in port, which would be five days?

A. I did not. On the bottom of the report it shows in port four and a half days and at sea seven and a

(Deposition of G. F. Thorndyke.)

half; that makes a total of twelve days.

Q. Those six voyages from which you have estimated the daily earnings, commenced on June 30, 1906, and ended October 22d, 1906, have you used the entire number of days included between those two dates in arriving at the net daily earnings?

A. I believe I have; yes.

Q. Mr. Thorndyke, will you take the gross earnings as you have computed them and stated in your testimony between June 30, 1906, and October 22, 1906, and make deductions therefrom so as to arrive at the net earnings as you have previously stated, and divide this latter figure by the number of days and find out what was the net earning per day during this period?

A. According to trip sheets commencing with voyage 48 to 52, inclusive, from June 30, 1906, to October 22, 1906, 112 days were consumed in the performance of the five voyages. The net profit to the owners was \$22,970.03, making a daily average profit of \$205.09. In arriving at these figures I have included the fixed estimate of depreciation of \$2,800, the fixed cost of insurance, \$3,892.75 and the fixed cost of maintenance, \$1,495.52. These three latter items, I however contend, should be included in arriving at the net earnings.

If I have said anything to the contrary in any of my testimony, it was under a misapprehension and is opposite to the facts and I did not mean to say it.

[157]

(Trip sheets received in evidence and marked

(Deposition of G. F. Thorndyke.)

“Respondent’s Exhibit No. 2.”)

Q. (Mr. BOGLE.) Mr. Thorndyke, has the “Meteor” been constantly employed since the time of this accident?

A. She was up to the time that we turned her over to the Pacific Coast Company, about April 15, 1907.

Q. She has been under charter to them ever since?

A. She is owned by them now, we sold her.

Q. And she had constant employment from the time these repairs were finished until you sold her?

A. Yes.

Q. How much did the company realize from the sale of her, Mr. Thorndyke?

Mr. CLISE.—We will object to that as irrelevant, immaterial and incompetent.

A. One-third of \$620,000.

Q. One-third of \$620,000? A. Yes.

Q. \$206,000? A. \$206,000.

Q. (Mr. CLISE.) Mr. Thorndyke, in reference to the number of men on board the ship at San Francisco, I will ask you whether there was a carpenter on board? A. I think so.

Q. What was his wages?

A. Fifty dollars a month, \$1.66 $\frac{2}{3}$ a day.

Q. And subsistence?

A. Subsistence sixty cents a day.

Q. Why was the vessel removed from Seattle to Rainier, and this extra expense incurred; would you have lost your charter-party with Mr. McCormick?

A. I don’t say that we would have lost the charter-party, because [158] the charter did not stipulate

(Deposition of G. F. Thorndyke.)

any time, but in order to advance the interests of the charterers we had to send the vessel over there, and we figured it would be a saving to the underwriters and to everybody concerned, the owner and everybody concerned, to send her over at the small additional expense, where it would have cost so much more here to have kept her.

G. F. THORNDYKE. [159]

[Recital as to Original Exhibits.]

(THE EXHIBITS WHICH WERE ATTACHED TO THE ORIGINAL REPORT OF THE COMMISSIONER are not included in this Transcript but are transmitted under separate cover as Original Exhibits, in accordance with a Stipulation of parties herein and the Order of said District Court, dated March 11th, 1913. Copy of said Stipulation and Order is embodied in this Transcript.)
[160]

**[Certificate of Notary Public to Depositions of
Frank Walker et al.]**

State of Washington,
County of King,—ss.

I, N. W. Bolster, a notary public in and for the State of Washington, do hereby certify that the foregoing depositions were taken before me at the time and place mentioned in the notice hereunto annexed, to wit, on the 19th day of April, 1910, at 11 o'clock A. M. of said day at room four hundred and sixteen,

Globe Building, Seattle, State of Washington; that the witnesses Frank Walker, C. W. Wiley and G. F. Thorndyke, named in said notice, were, before testifying, by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that said depositions were taken down by me in shorthand, by agreement of the parties, and thereafter transcribed into longhand and by me carefully read over to each of said witnesses, respectively, and being by said witnesses corrected, were then and there subscribed by each of said witnesses, respectively, in my presence.

And I do further certify that the exhibits hereunto annexed and marked, respectively, Libelant's Exhibits "A," "B," "C," "D" and "E," and "Respondent's Exhibits 1 and 2," were introduced and received in evidence during the taking of said depositions as part of the testimony of said witnesses, and the same were all the exhibits so introduced, and said exhibits are hereto attached and returned as part of said depositions.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal this 3d day of May, A. D. 1910.

[Seal]

N. W. BOLSTER,

Notary Public in and for the State of Washington,
Residing at Seattle.

Notary's fees, paid by libelant, \$31.40.

N. W. BOLSTER, Notary. [161]

(FOR DATE OF FILING, etc., SEE REPORT
OF COMMISSIONER ON DAMAGES, etc.)

*In the District Court of the United States, in and for
the Northern District of California.*

Nos. 13,602 and 13,648.

GLOBE NAVIGATION CO., LTD.,

Libelant,

vs.

Tug "ADA WARREN " et al.,

Respondents.

**Order Extending Time [to February 4, 1912, to
Except to Report of Commissioner, etc.].**

GOOD CAUSE APPEARING THEREFOR, IT
IS HEREBY ORDERED that claimant in the
above-entitled cause may have to and including the
4th day of February, 1912, in which to except to the
Report of the Commissioner in said cause, presented
in open court on the 26th day of January, 1912,
should claimant be so advised.

Dated January 31st, 1912.

R. S. BEAN,

Judge of the District Court.

Due service and receipt of a copy of the within
Order Extending Time is hereby admitted this 1st
day of February, 1912.

WILLIAM DENMAN,

DENMAN and ARNOLD,

Proctors for Libelant.

[Endorsed]: Filed Feby. 1, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [163]

*In the District Court of the United States, in and for
the Northern District of California.*

Nos. 13,602 and 13,648.

GLOBE NAVIGATION CO., LTD.,

Libelant,

vs.

Tug "ADA WARREN," et al.,

Respondents.

**Order Extending Time [to February 5, 1912, to
Except to Report of Commissioner].**

GOOD CAUSE APPEARING THEREFOR, IT
IS HEREBY ORDERED that claimant in the
above-entitled cause may have to and including the
5th day of February, 1912, in which to except to the
Report of the Commissioner in said cause, presented
in open court on the 26th day of January, 1912,
should claimant be so advised.

Dated February 5th, 1912.

R. S. BEAN,

Judge of the District Court.

[Endorsed]: Filed Feb. 5, 1912. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [164]

*In the District Court of the United States, in and for
the Northern District of California.*

GLOBE NAVIGATION COMPANY, LIMITED,
a Corporation.

Libelant,

vs.

Tug "ADA WARREN," Her Tackle, Apparel and
Furniture,

Respondent.

Exceptions to Report of Commissioner.

Now comes respondent above named and objects and excepts to the Report of the Commissioner, Honorable James P. Brown, presented in open court on the 26th day of January, 1912, assessing libelant's damages in the above-entitled cause, and to the allowance of the damages therein specified and assessed, as follows, to wit:

I.

Objects and excepts to the item, and to the allowance thereof, in said report which fixes the damages to the hull of the "Meteor" at the contract price for repairs, to wit, at the sum of \$9,875.00, and to the allowance of said item. And as grounds for such objection and exception, respondent specified as follows:

That it appears that the collision occurred in Carquinez Straits on October 11, 1906. The repairs on the "Meteor" were not made in San Francisco where the proper facilities therefor exist, but the steamer proceeded on a voyage to Tacoma and Everett, on Puget Sound. After that she proceeded

to Seattle for repairs. There was no evidence before the Commissioner that the repairs made were all, or partly, the result of the collision in Carquinez Straits. [165] For all that appears they may have been necessitated by accidents occurring on the steamer's voyage after she left San Francisco.

That there was no proper showing, what the actual cost of the repairs was. The statement of Particular Average, signed by Johnson & Higgins on February 20, 1907, and referred to in the Seattle depositions, pages 3 and 4, was made by one who knew nothing of the facts, but was presumably informed by others who likewise knew nothing of the facts. It is utterly incompetent as legal proof. The Standard Boiler Works (presumably of Seattle) made the repairs; they alone know what the value or cost of the repairs was; they were the proper witnesses to prove these facts, but they have not been called. The contract price of \$9,875.00, mentioned, in Seattle depositions, page 7, may be *greater* than the actual cost of the repairs.

That there was no showing what the cost of repairs of the collision damage would have been in San Francisco, the nearest port for making these repairs. For all that appears, the cost of these same repairs (assuming them arguendo to be the result of the collision) might have been, in San Francisco, only one-half or one-third the cost at Seattle; that said sum of \$9,875.00 is an excessive and unreasonable amount for the damage to the hull of said steamship.

II.

Objects and excepts to the item, and to the allow-

ance thereof, in said report, which includes and allows as damages caused by the said collision, the sum of \$34.80 as the cost of fairing anchor. And as grounds for such objection and exception specifies that it does not appear in the testimony introduced in this cause that said cost was in any manner caused by said collision, or that the disbursement of said sum was necessitated thereby, or the result thereof; that said sum as assessed is excessive, unreasonable, and unsupported by the evidence in this cause. [166]

III.

Objects and excepts to the item, and to the allowance thereof, in said report, which includes and allows as damages caused by said collision, the sum of \$159.72, as the cost of crew at San Francisco for two days, at \$79.86 per day. And as grounds for such objection and exception, specifies that it does not appear from the testimony introduced in this cause that said cost was caused by the said collision, or that the disbursement of said sum was necessitated thereby, or the result thereof; that it does not appear that it was necessary for said steamship to remain during said time in San Francisco; that it appears that said steamship was not repaired in San Francisco, but in the State of Washington, and that, since she was there repaired, and not in San Francisco, said cost was wholly superfluous and unnecessary; that, so far as appears, said expense would have been incurred had said collision never occurred; that said sum as assessed is excessive, unreasonable, and unsupported by the evidence in this cause.

III.

Objects and excepts to the item, and to the allowance thereof, in said report, which includes and allows as damages caused by said collision, the sum of \$163.05, as the cost of captain and two watchmen for fifteen days at Seattle, at \$10.87 per day. And as grounds for such objection and exception, specifies that it does not appear from the testimony introduced in said cause that said cost was necessary, in that it does not appear that the contract for the repairing of the hull of said steamship did not include the hire of the watchman or watchmen necessary for the safety of said steamship during said time; that it does not appear that it was necessary to retain the services of the captain during said time; that it appears that the captain, during said time, was engaged in preparing for the next voyage of said steamship in the same manner as if no collision had occurred; that it does not appear that it was necessary to retain the services of more than one [167] watchman during said time; that it does not appear that said two watchmen would not have been retained during said period, while said vessel was preparing for her next voyage, had no collision occurred; that it does not appear that if said steamship had been repaired in the port of San Francisco, the port nearest to the place of collision, the time necessitated by repairs would not have been materially shortened, and the services of two or any watchmen unnecessary; that said cost as assessed is excessive, unreasonable, and unsupported by the evidence in the cause.

IV.

Objects and excepts to the item, and to the allowance thereof, in said report, which includes and allows as damages caused by said collision, the sum of \$2,188.07 as the value of the net earnings of said vessel for seventeen days at \$128.71 per day, or as a demurrage of \$242.42 per day for two days at San Francisco, and \$173.43 per day for fifteen days at Seattle. And as grounds for such objection and exception, specifies that it does not appear from the testimony introduced in this cause that said amount is the reasonable value of the net earnings of the ship for said time; that it does not appear that it was necessary that she should have been detained for two, or any, days at San Francisco; that it does not appear that it was necessary that she should have been detained for fifteen days at Seattle; that it does not appear that if she had been repaired in the port of San Francisco, a much less amount of time would not have been sufficient to effect the repairs which were made in Seattle; that no evidence was produced showing the amount said vessel was actually worth to the owner per day; that no evidence was produced to show the daily net earnings of said vessel for any length of time immediately prior to the collision, and that no basis is shown by which the fair average of the net earnings of said vessel per day at the time of the collision can be determined; that it appears that the 15 days were occupied in preparing the [168] vessel for her next voyage, and that such detention was not in any manner due to said collision, but would have occurred had no collision taken place;

that it appears from the evidence that said vessel was not detained in Seattle for 15 days, but it appears she was there detained for not more than 14 days; that said amount as assessed is excessive, unreasonable, and unsupported by the evidence in this cause.

V.

Objects and excepts to the item, and to the allowance thereof, in said report, which includes and allows as damages caused by said collision, the sum of \$575.45 as the insurance for 17 days at \$33.85 per day. And as grounds for such objection and exception, specifies that the evidence shows no connection between the collision and any insurance; that it does not appear that the collision necessitated the disbursement of said sum per day, or that it was disbursed, or that the cost of insurance on said vessel would not have been the same had no collision occurred; that the cost of insurance if in any manner affected by said collision must have been decreased by reason of the vessel being detained in safe ports during said time instead of exposed to the dangers of the seas; that said amount as assessed is excessive, unreasonable and wholly unsupported by the evidence in this cause.

WHEREFORE respondent prays that the said report of said Commissioner, and each and every item therein, be disallowed; that the same be not confirmed by this Honorable Court.

ANDROS & HENGSTLER,

Proctors for Respondent.

[Endorsed]: Filed Feb. 3, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [169]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 6th day of November, in the year of our Lord, one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

[Minutes—November 6, 1912—Hearing of Exceptions to Commissioner's Report, etc.]

13,602.

GLOBE NAVIGATION CO.

vs.

“ADA WARREN,” etc.

The exceptions to the report of the U. S. Commissioner filed herein on January 26, 1912, this day came on for hearing, G. Bell, Esqr., appearing for and Wm. Denman, Esqr., opposing said exceptions. Mr. Denman made a motion that the testimony taken at the hearing of the cause on its merits be received in evidence in support of the said report, which said motion was by the Court ordered granted, and Mr. Denman introduced the evidence and after hearing counsel, by the Court ordered that the further hearing be continued until Nov. 11/12. [170]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Mon-

day, the 11th day of November, in the year of our Lord, one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

[Minutes—November 11, 1912—Hearing of Exceptions to Commissioner's Report.]

13,602.

GLOBE NAVIGATION CO.

vs.

“ADA WARREN,” etc.

The exceptions to the report of the U. S. Commissioner herein this day came on for hearing, and after hearing Mr. Bell in support thereof and Mr. Wm. Denman, Esqr., in opposition, by the Court ordered that said exceptions be, and they are hereby submitted to the Court for decision, with leave to Mr. Denman to file a brief. [171]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 2d day of December, in the year of our Lord, one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

**[Minutes—December 2, 1912—Order Overruling
Exceptions to Commissioner's Report, and
Confirming Said Report.]**

#13,602.

GLOBE NAVIGATION CO.

vs.

Tug "ADA WARREN," etc.

The exceptions to the report of the U. S. Commissioner as to the amount of damages sustained by libelant, having heretofore been submitted to the Court for determination, now after due consideration had, by the Court ordered that said exceptions be, and the same are hereby overruled, and the said report of the Commissioner confirmed. [172]

*In the District Court of the United States, in and for
the Northern District of California.*

IN ADMIRALTY.

GLOBE NAVIGATION CO., a Corporation,
Libelant,

vs.

Tug "ADA WARREN," etc.,
Respondent.

WARREN IMPROVEMENT COMPANY, a Corporation,
Claimant.

Final Decree.

This cause having heretofore come on for hearing,

and it having been duly decided that the claimant, Warren Improvement Company, was liable to libelant for the collision set forth in the libel, and the cause being then referred to James P. Brown, United States Commissioner to hear evidence and determine the damage suffered by libelant, and thereafter the report of said Commissioner having been returned, and the cause now coming on to be heard on the exceptions of the claimant to the said report of James P. Brown, and the proctors for the respective parties having been heard, and due deliberation having been had in the premises by the Court,

IT IS ORDERED, ADJUDGED AND DECREED that the said exceptions of claimant to the report of the Commissioner be, and the same are hereby, overruled and disallowed, and the report of the said Commissioner be, and the same is hereby, in all respects, affirmed; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said libelant, Globe Navigation Co., Limited, a corporation, do have and recover for the cause of action set forth in its said libel, the [173] sum of Twelve Thousand Nine Hundred and Ninety-six Dollars (\$12,996.00), together with interest thereon from the 20th day of November, 1906, to the date hereof, at six (6) per cent per annum, amounting to Four Thousand Seven Hundred and Eight Dollars (\$4,708), amounting in all to the sum of Seventeen Thousand Seven Hundred and Four Dollars (\$17,704), being the amount awarded by said Commissioner, and interest on this decreed amount from the date hereof, at six (6) per

cent per annum, together with its costs, to be hereafter taxed; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that unless an appeal be taken from this decree within ten (10) days after service of notice of entry of this decree on the proctors for said claimant and a supersedeas bond staying execution be filed, as required by law, the Warren Improvement Company, a corporation, and the National Surety Company, the stipulators for value on the part of the claimant of the said tug "Ada Warren," cause the engagement of their said stipulation to be performed, or show cause within four (4) days after the expiration of the said ten (10) days, or on the first day of jurisdiction thereafter, why execution should not issue against their goods, chattels and lands for the amount of this decree, with interest thereon, according to their stipulation.

Done in open court this 3d day of December, 1912.

JOHN J. DE HAVEN,

Judge.

Entered in Vol. 5, Judg. and Decrees, at page 28.

[Endorsed]: Filed Dec. 3, 1912. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [174]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,602.

GLOBE NAVIGATION CO., a Corporation,
Libelant,

vs.

Tug "ADA WARREN," Her Engines, etc.,
Respondent.

WARREN IMPROVEMENT CO., a Corporation,
Claimant.

Notice of Appeal.

To Globe Navigation Co., a Corporation, Libelant
Herein, to Messrs. Denman and Arnold and
William Denman, Proctors for said Libelant,
and to W. B. Maling, Clerk of the District Court
of the United States, for the Northern District
of California, Division 1.

You, and each of you, will please take notice that
the WARREN IMPROVEMENT CO., a corpora-
tion, claimant herein, hereby appeals to the United
States Circuit Court of Appeals for the Ninth Cir-
cuit, from the final decree of the District Court of
the United States, for the Northern District of Cali-
fornia, entered in said cause on the third day of
December, 1912.

Dated January 7th, 1913.

ANDROS & HENGSTLER,
Proctors for Claimant.

Due service and receipt of a copy of the within

Notice of [175] Appeal is hereby admitted this 8th day of January, 1913.

DENMAN & ARNOLD,
Proctors for Libelant.

[Endorsed]: Filed Jan. 8, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [176]

*In the District Court of the United States, in and
for the Northern District of California.*

No. 13,602.

GLOBE NAVIGATION COMPANY, LIMITED,
a Corporation,

Libelant and Appellee,
vs.

Tug "ADA WARREN," Her Tackle, Apparel and
Furniture,

Respondent.

WARREN IMPROVEMENT COMPANY, a Cor-
poration,

Claimant and Appellant.

Assignment of Errors.

Comes now WARREN IMPROVEMENT COMPANY, a corporation, claimant and appellant herein, and assigns as error in the findings, proceedings and decree of the District Court, the following:

1. The District Court erred in finding and deciding that Globe Navigation Co., Limited, should recover for the cause of action set forth in its libel.

2. The District Court erred in finding and deciding that it was the duty of the "Ada Warren"

and her tow, under the circumstances disclosed by the evidence, to keep out of the way of the "Meteor."

3. The District Court erred in finding and deciding that the "Ada Warren" and her tow were in fault in attempting to cross the bow of the "Meteor" under the circumstances disclosed by the evidence.

4. The District Court erred in finding and deciding that the "Meteor" was the privileged vessel under the circumstances disclosed by the evidence.
[177]

5. The District Court erred in finding and deciding that the "Meteor" was not in fault in holding her course and speed under the circumstances disclosed by the evidence.

6. The District Court erred in not finding and deciding that the circumstances disclosed by the evidence were such as to justify the master of the "Meteor," as a prudent navigator, in believing, prior to the collision, that a collision was imminent, unless he changed her course and slackened her speed for the purpose of keeping out of the way of the burdened vessel.

7. The District Court erred in finding and deciding that the collision must be attributed solely to the "Ada Warren" and her tow.

8. The District Court erred in finding and deciding that the testimony of the Master of the "Meteor," and the witness Miller, as to the place and as to the circumstances immediately preceeding and surrounding the collision, is not so inherently improbable as to justify the Court in rejecting it.

9. The District Court erred in not finding and

deciding that the "Meteor" was guilty of negligence which contributed to the collision.

10. The District Court erred in finding and deciding that the collision did not take place on the Port Costa side of the Straits of Carquinez, about a quarter mile off the shell factory at Selby's.

11. The District Court erred in not finding and deciding that the "Meteor" was solely in fault in colliding with the "Ada Warren" and her tow, in that, at the time of the collision, the "Meteor" had no licensed pilot on board, and the master in charge of the "Meteor" was wholly unfamiliar with the waters in which the collision occurred.

12. The District Court erred in not finding and deciding that the "Meteor" was solely at fault in colliding with the [178] "Ada Warren" and her tow, in that the "Meteor" approached the "Ada Warren" and her tow at a rate of speed which was excessive under the circumstances.

13. The District Court erred in not finding and deciding that the "Meteor" had ample warning prior to the collision that the "Ada Warren" was burdened with a tow and was about to cross the bow of the "Meteor."

14. The District Court erred in not finding and deciding that, under the circumstances disclosed by the evidence, it was the duty of the "Meteor" to keep out of the way of the "Ada Warren" and her tow.

15. The District Court erred in not finding and deciding that, under the circumstances disclosed by the evidence, the "Ada Warren" and her tow had

the right of way.

16. The District Court erred in not finding and deciding that the "Meteor" was solely in fault in colliding with the "Ada Warren" and her tow, in that the "Meteor" neglected to take the proper precautions to avoid the collision.

17. The District Court erred in not finding and deciding that the "Meteor" was solely in fault in colliding with the "Ada Warren" and her tow, in that the "Meteor," after assenting to the passing signal of the "Ada Warren" and her tow, did not carry her assent into effect.

18. The District Court erred in not finding and deciding that the "Meteor" was solely in fault in colliding with the "Ada Warren" and her tow, in that the "Meteor," after assenting to pass the "Ada Warren" and her tow on the port side of the "Ada Warren," navigated contrary to her assent and stopped and reversed, thereby throwing herself across the course of the "Ada Warren" and her tow.

19. The District Court erred in not finding and deciding that the "Ada Warren" and her tow did not cross the bow of the "Meteor" from port to starboard. [179]

20. The District Court erred in not finding and deciding that the "Meteor" was solely in fault in that the "Meteor," knowing that the "Ada Warren" and her tow were not keeping out of the way of the "Meteor," failed to starboard her helm and go around the stern of the "Ada Warren" and her tow.

21. The District Court erred in not finding and deciding that the collision took place on the Port

Costa side of the Straits of Carquinez, about a quarter of a mile off the shell factory at Selby's.

22. The District Court erred in awarding damages to libelant in the sum of \$12,996.00.

23. The District Court erred in awarding to libelant, by its decree, interest upon the sum of \$12,996.00 from the 20th day of November, 1906, to the date of the decree herein.

24. The District Court erred in awarding to libelant, by its decree, interest upon the sum of \$17,704.00 from the date of the decree.

25. The District Court erred in affirming the report of the Commissioner determining the damages suffered by libelant, and in overruling the exceptions of claimant thereto.

26. The District Court erred in affirming that portion of the Commissioner's report which finds that the damages to the hull of the "Meteor," caused by the collision, amount to the sum of \$9,875.00, and in overruling the exceptions of claimant thereto.

27. The District Court erred in affirming that portion of the Commissioner's report which finds that the damages to the anchor of the "Meteor," caused by the collision, amount to the sum of \$34.80, and in overruling the exceptions of claimant thereto.

28. The District Court erred in affirming that portion of the Commissioner's report which allows as damages caused by the collision the sum of \$159.72 as the cost of the crew of the "Meteor" at San Francisco for two days, and in overruling the exceptions of claimant thereto. [180]

29. The District Court erred in affirming that

portion of the Commissioner's report which allows as damages caused by the collision, the sum of \$163.05 as the cost of Captain and two watchmen for the "Meteor" for fifteen days at Seattle, and in overruling the exceptions of claimant thereto.

30. The District Court erred in affirming that portion of the Commissioner's report which allows as damages caused by the collision, the sum of \$2,188.07 as the value of the net earnings of the "Meteor" for seventeen days, and in overruling the exceptions of claimant thereto.

31. The District Court erred in affirming that portion of the Commissioner's report which allows as damages caused by the collision the sum of \$575.45 as the premiums for insurance on the "Meteor" for seventeen days, and in overruling the exceptions of claimant thereto.

Dated San Francisco, Cal., April 2d, 1913.

ANDROS & HENGSTLER,

LOUIS T. HENGSTLER,

Proctors for Claimant and Appellant.

[Endorsed]: Filed Apr. 2, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [181]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,602.

GLOBE NAVIGATION CO., a Corporation,
Libelant,

vs.

Tug "ADA WARREN," Her Engines, etc.,
Respondent.

WARREN IMPROVEMENT CO., a Corporation,
Claimant.

**Stipulation [and Order Extending Time to January
28, 1913, to File Bond for Costs of Appeal and
Bond to Stay Execution of Decree, and Staying
Such Execution to January 28, 1913].**

IT IS HEREBY STIPULATED AND AGREED
that appellant and claimant in the above-entitled
cause may have to and including the 28th day of
January, 1913, within which to file a bond for costs
of the appeal, and also within which to file a bond to
stay the execution of the decree entered in the above-
entitled cause on the 3d day of December, 1912, and
execution of said decree is hereby agreed to be stayed
to and including the 28th day of January, 1913.

Dated January 18, 1913.

WILLIAM DENMAN,
Proctors for Libelant.

So ordered:

FRANK S. DIETRICH,
Judge.

Jan. 18, 1913.

[Endorsed]: Filed Jan. 18, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [182]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,602.

GLOBE NAVIGATION CO., a Corporation,
Libelant,

vs.

Tug "ADA WARREN," Her Engines, etc.,
Respondent.

WARREN IMPROVEMENT CO., a Corporation,
Claimant.

**Stipulation [Extending Time to February 1, 1913, to
File Bond for Costs of Appeal and Bond to Stay
Execution of Decree, and Staying Such Exe-
cution to February 17, 1913.]**

IT IS HEREBY STIPULATED AND AGREED
that appellant and claimant in the above-entitled
cause may have to and including the 1st day of
February, 1913, within which to file a bond for costs
of appeal, and also within which to file a bond to stay
the execution of the decree entered in the above-
entitled cause on the 3d day of December, 1912, and
execution of said decree is hereby agreed to be
stayed to and including the 17th day of February,
1913.

Dated: January 27, 1913.

DENMAN and ARNOLD,
Proctors for Libelant.

So ordered:

_____,
Judge.

Jan. 28, 1913.

[Endorsed]: Filed Jan. 28, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [183]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 13,602.

GLOBE NAVIGATION CO., a Corporation,
Libelant,

vs.

Tug "ADA WARREN," Her Engines, etc.,
Respondent.

WARREN IMPROVEMENT CO., a Corporation,
Claimant.

**Stipulation [and Order Extending Time to February
21, 1913, to File Bond for Costs of Appeal and
Bond to Stay Execution of Decree, and Staying
Such Execution to February 21, 1913].**

IT IS HEREBY STIPULATED AND AGREED
that appellant and claimant in the above-entitled
cause may have to and including the 21st day of
February, 1913, within which to file a bond for costs
of appeal, and also within which to file a bond to

stay the execution of the decree entered in the above-entitled cause on the 3d day of December, 1912, and execution of said decree is hereby agreed to be stayed to and including the 21st day of February, 1913.

Dated January 31st, 1913.

WILLIAM DENMAN,
DENMAN & ARNOLD,

Proctors for Libelant.

So ordered:

FRANK S. DIETRICH,
Judge.

Dated *Jan. 1st*, 1913.

[Endorsed]: Filed Feb. 1, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [184]

*In the District Court of the United States in and for
the Northern District of California.*

No. 13,602.

GLOBE NAVIGATION COMPANY, a Corporation,
Libelant and Appellee,
vs.

Tug "ADA WARREN," Her Engines, etc.,
Respondent.

WARREN IMPROVEMENT CO., a Corporation,
Claimant and Appellant.

Stipulation and Order Concerning Original Exhibits.

It is hereby stipulated and agreed between the proctors for the respective parties hereunto, that all

the exhibits introduced in evidence at the hearing of the above-entitled cause before the above Court, and all the exhibits introduced in evidence before the Commissioner to whom said cause was referred for the determination of libelant's damages, may be omitted from the Apostles on Appeal in said cause and may be filed in the United States Circuit Court of Appeals for the Ninth Circuit in the original form in which the same were respectively introduced before said Court and said Commissioner.

Dated March 11, 1913.

ANDROS & HENGSTLER,
Proctors for Appellant. [185]
WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Respondent.

So ordered—March 11th, 1913.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Mar. 11, 1913, at 2 o'clock and
— min. P. M. W. B. Maling, Clerk. By Francis
Krull, Deputy Clerk. [186]

[Certificate of Clerk U. S. District Court to
Apostles.]

United States of America,
Northern District of California,—ss.

I, W. B. Maling, Clerk of the District Court of the
United States for the Northern District of Cali-
fornia, do hereby certify that the foregoing and
hereunto annexed one hundred and eighty-six (186)

pages, numbered from one (1) to one hundred and eighty-six (186), inclusive, with accompanying exhibits, eleven (11) in number, transmitted under separate covers, contain a full, true and correct transcript of the records, as the same now appear of record in the said District Court, in the case of Globe Navigation Company, Limited, a corporation, vs. Tug "Ada Warren," her tackle, apparel and furniture, No. 13,602, said transcript being prepared pursuant to "Praecipe," embodied in this transcript, and in accordance with the instructions of Messrs. Andros and Hengstler, proctors for claimant and appellant herein.

I further certify that the costs of preparing and certifying to the foregoing transcript of appeal is the sum of One Hundred and Five and 20/100 Dollars (\$105.20), and that the same has been paid to me by proctors for claimant and appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 15th day of April, A. D. 1913.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk. [187]

[Endorsed]: No. 2267. United States Circuit Court of Appeals for the Ninth Circuit. Daniel E. Morris, Louis A. Lloyd and J. A. Maguire, as Trustees of the Warren Improvement Company, a Corporation, Claimant of the Tug "Ada Warren," Her Tackle, Apparel and Furniture, Appellants, vs. The

Globe Navigation Company, a Corporation, Appellee.
Apostles on Appeal. Upon Appeal from the United
States District Court for the Northern District of
California, First Division.

Filed April 15, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the District Court of the United States in and for
the Northern District of California.*

No. 13,602.

GLOBE NAVIGATION COMPANY, a Corporation,
Libelant,

vs.

Tug "ADA WARREN," Her Engines, etc.,
Respondent.

WARREN IMPROVEMENT CO., a Corporation,
Claimant.

**Order Extending Time [to March 8, 1913], to File
Apostles on Appeal.**

GOOD CAUSE APPEARING THEREFOR, IT
IS HEREBY ORDERED that the appellants in the
above-entitled cause, may have to and including the
8th day of March, 1913, within which to procure
to be filed in the Circuit Court of Appeals the Apos-
tles on Appeal in said cause.

Dated San Francisco, Cal., February 7, 1913.

WM. W. MORROW,
Judge of Said Court.

[Endorsed]: No. 13,602. District Court of the United States for the Northern District of California. Globe Navigation Co., a Corporation, Libelant, vs. Tug "Ada Warren," Her Engines, etc., Respondent. Order. Filed Feb. 13, 1913. F. D. Monckton, Clerk.

*In the District Court of the United States in and for
the Northern District of California.*

No. 13,602.

GLOBE NAVIGATION COMPANY, a Corporation,
Libelant,

vs.

Tug "ADA WARREN," etc.,

Respondent.

WARREN IMPROVEMENT CO., a Corporation,
Claimant.

**Stipulation [and Order Extending Time to April 7,
1913, to Prepare Apostles on Appeal].**

IT IS HEREBY STIPULATED AND AGREED
that an Order of Court may be made extending the
time for the preparation of the Apostles on Appeal

in the above case to and including the 7th day of April, 1913.

WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Libelant.
ANDROS & HENGSTLER,
Proctors for Claimant.

Dated March 8th, 1913.

So ordered.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. 13,602. District Court of the United States for the Northern District of California. Globe Navigation Co., a Corporation, Libelant, vs. Tug "Ada Warren," etc., Respondent. Stipulation. Filed Mar. 8, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk.

No. 2267. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Apr. 7, 1913, to File Record Thereof and to Docket Case. Filed Mar. 29, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 13,602.

GLOBE NAVIGATION COMPANY, LIMITED, a
Corporation,

Libelant,

vs.

Tug "ADA WARREN," Her Tackle, Apparel and
Furniture,

Respondent.

**Order Extending Time [to April 12, 1913] to File
Apostles on Appeal.**

Good cause appearing therefore, it is hereby ordered that the Clerk of the District Court of the United States, for the Northern District of California have five (5) days further time from and after the 7th day of April, 1913, in which to file the Apostles on Appeal herein.

WM. C. VAN FLEET,
Judge.

Dated April 7th, 1913.

[Endorsed]: No. 2267. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to April 12, 1913, to File Record Thereof and to Docket Case. Filed Apr. 7, 1913. F. D. Monckton, Clerk.

**[Order Extending Time to April 15, 1913, to Prepare
Transcript on Appeal.]**

*In the Circuit Court of the United States for the
Ninth Circuit.*

WARREN IMPROVEMENT COMPANY, etc.,

vs.

GLOBE NAVIGATION COMPANY, etc.

Good cause appearing therefor, it is hereby *order* that the Clerk of the District Court of the United States for the Northern District of California, have further time in which to prepare the Transcript of

Appeal herein, to wit, to and including the 15th day of April, 1913.

WM. C. VAN FLEET,
Judge.

Dated April 12th, 1913.

[Endorsed]: No. 2267. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to April 15, 1913, to File Record Thereof and to Docket Case. Filed Apr. 12, 1913. F. D. Monckton, Clerk.

No. 2267. United States Circuit Court of Appeals, for the Ninth Circuit. Orders Under Rule 16 Enlarging Time to April 15, 1913, to File Record Thereof and to Docket Case. Re-filed Apr. 15, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, in
and for the Ninth Circuit.*

No. 13,602.

GLOBE NAVIGATION CO., a Corporation,
Libelant and Appellee,
vs.

WARREN IMPROVEMENT CO., a Corporation,
Claimant and Appellant.

Notice of Filing of Apostles on Appeal.

To the Globe Navigation Company, a Corporation,
Appellee Herein, to William Denman, Esq., to
Messrs. Denman & Arnold, and to Messrs. Smith
& Pringle, Proctors for Appellee:

You, and each of you, will please take notice that

the Apostles on Appeal in the above-entitled cause were on 15th day of April, 1913, filed with the Clerk of the above-entitled court.

Dated April 19th, 1913.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,

Proctors for Appellant.

Due service and receipt of a copy of the within Notice of Filing of Apostles on Appeal is hereby admitted this 19th day of April, 1913.

WILLIAM DENMAN,
G. S. ARNOLD,
J. R. PRINGLE,

Proctors for Appellee.

[Endorsed]: No. 2267. In the United States Circuit Court of Appeals, for the Ninth Circuit. Globe Navigation Co., a Corporation, Libelant and Appellee, vs. Warren Improvement Co., a Corporation, Claimant and Appellant. Notice of Filing of Apostles on Appeal. Filed Apr. 25, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, in
and for the Ninth Circuit.*

WARREN IMPROVEMENT COMPANY, a Corporation,

Appellant,

vs.

GLOBE NAVIGATION COMPANY, a Corporation,

Appellee.

Stipulation [that Daniel E. Morris et al. be Made Parties, etc.]

It is hereby stipulated and agreed, by and between the parties to the above-entitled action, that Daniel E. Morris, Louis A. Lloyd and J. A. Maguire, as Trustees of the Warren Improvement Company, may be made parties to the above-entitled action, and shall be deemed to have been parties to the said litigation at all times on and since the 30th day of November, 1910, on which date the charter of the Warren Improvement Company was forfeited under and by virtue of the laws of the State of California, for failure to pay its State License Tax.

ANDROS & HENSTLER,
LOUIS T. HENGSTLER,

Proctors for Appellant, Warren Improvement Company, and Daniel E. Morris, Louis A. Lloyd, and J. A. Maguire.

DENMAN and ARNOLD,
WILLIAM DENMAN,

Proctors for Appellee.

[Endorsed]: 2267. In the United States Circuit Court of Appeals, in and for the Ninth Circuit. Warren Improvement Company, a Corporation, Appellant, vs. Globe Navigation Company, a Corporation, Appellee. Stipulation. Filed March 7, 1913. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the seventh day of March, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge; Honorable FRANK S. DIETRICH, District Judge.

No. [Undocketed.]

WARREN IMPROVEMENT COMPANY, a Corporation,

Appellant,

vs.

GLOBE NAVIGATION COMPANY, a Corporation,

Appellee.

Order Making Daniel E. Morris et al. as Trustees, etc., Parties Appellant.

Pursuant to the stipulation of counsel this day filed therefor, and on motion of Mr. Golden W. Bell, on behalf of counsel for the appellant, it is ORDERED that Daniel E. Morris, Louis A. Lloyd and J. A. Maguire, as Trustees of the Warren Improvement Company, be, and hereby are made parties appellant to the above-entitled cause; and

It is FURTHER ORDERED that the said Daniel E. Morris, Louis A. Lloyd and J. A. Maguire, as

Trustees of the Warren Improvement Company, shall be deemed to have been parties to the cause at all times on or since the thirtieth day of November, A. D. 1910, on which date the charter of the Warren Improvement Company was forfeited under and by virtue of the laws of the State of California, for failure to pay its State License Tax.

Certificate as to Exhibits.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the annexed documents, eight in number, known as and marked:

Libelant's Exhibit "D"—Findings of O. F. Bolles, and John K. Bolger, United States Local Inspectors; which was filed at the hearing of this cause in the District Court;

Libelant's Exhibit "A"—Statement of Particular Average and Protection Claim—"Meteor";

Libelant's Exhibit "B"—Bill of "Meteor" to Standard Boiler Works.

Libelant's Exhibit "C"—Bill of "Meteor" to Standard Boiler Works.

Libelant's Exhibit "D"—Letter Globe Navigation Company to Charles R. McCormick & Co.

Libelant's Exhibit "E"—Telegram from Baxter to Globe Navigation Co.

Respondent's Exhibit 1—Letter from Baxter to Globe Navigation Co.

Respondent's Exhibit 2—5 sheets Voyage Earnings and Expenses—Globe Navigation Co.;

which were originally attached to the Report of Commissioner; and three documents transmitted under separate cover and known as and marked:

Libelant's Exhibit "A"—Cardboard model of
"Ada Warren," etc.;

Libelant's Exhibit "B"—Cardboard model
"Meteor";

Libelant's Exhibit "C"—Chart—San Pablo
Bay;

which were filed during the hearing of this cause in the District Court, are original exhibits, introduced and filed in the case of the Globe Navigation Company, a corporation, etc., vs. the Tug "Ada Warren," her engines, etc., No. 13,602, as the same now appear of record in this office.

Said Exhibits are transmitted with the Transcript of Appeal herewith in their original form, in accordance with stipulation of parties hereto and the order of the said District Court, dated March 11th, 1913.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 15th day of April, A. D. 1913.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk.

[Libelant's Exhibit "A"—Statement of Particular Average and Protection Claim—Str. "Meteor."]

[In pencil:] Ada Warren—Portland Dock—Propeller Blade.

STATEMENT
of
PARTICULAR AVERAGE & PROTECTION
CLAIM

Case of the
Str. "METEOR"
Aug. 11th, 1906.
Oct. 11th, 1906.

Johnson & Higgins,
Average Adjusters.

[Endorsed]: Libellant's Exhibit "A." N. W. B.,
Notary.

No. 2267. U. S. Circuit Court of Appeals for the
Ninth Circuit. Libelant's Exhibit "A." Received
Apr. 15, 1913. F. D. Monckton, Clerk.

STATEMENT
of
PARTICULAR AVERAGE & PROTECTION
CLAIM

Case of the
Str. "METEOR"
Aug. 11th, 1906.
Oct. 11th, 1906.

1906.

Aug. 11th., 10 A. M., this vessel left Linnton
Wharf, Portland, Oregon, with a cargo of lumber for

the coal bunkers of the Independent Coal and Ice Company, also at Portland, for fuel and thence to Oakland, California.

About 11:40 A. M., the stem of the steamer came in contact with and carried away a dolphin of the Coal and Ice Company.

Leaving the bunkers the propeller struck a sunken snag in consequence of which one of the blades was carried away.

Aug. 12th, 5:10 A. M., the steamer stranded
2
on a sand bank off Astoria, Oregon, during a thick fog, but was floated five minutes later by working the engines full speed astern.
1906.

Oct. 11th, 4:15 A. M., the steamer sailed from Port Costa, California, with a part cargo of ore, bound to ports on Puget Sound, via San Francisco.

4.42 A. M., The tug "Ada Warren" with a barge loaded with rock, collided with the steamer. Both the tug and tow struck the port bow of the steamer in consequence of which considerable damage was sustained. The scow was anchored and the steamer took the tug in tow for San Francisco, where they arrived at 10.10 A. M.

A survey was held on the steamer and she was pronounced seaworthy for the voyage.

Oct. 13th, At 1 P. M., the voyage was resumed.

Oct. 22nd., The steamer arrived at Seattle where a second survey was held. Specifications for repairs were drawn and tenders for the work were called for and procured. The contract of repairs was

awarded to The Standard Boiler Works for the sum of \$9875.00, this being the lowest tender.

The owners of the steamer have filed a libel against the tug "Ada Warren" for the recovery of their damages. A cross libel has been filed by the owners of the tug and barge against the "Meteor." Upon the result of a suit, a further statement will be issued, if necessary, dealing with the final settlement.

As provided in the contract of affreightment, this adjustment is made in accordance with the York-Antwerp Rules.

STATEMENT

of

PARTICULAR AVERAGE & PROTECTION CLAIM

Aug. 11th, 1906.

Oct. 11th, 1906.

6

EXTRACT FROM LOG BOOK.

1906.

August 11th, 10 A. M. Finished loading 10.25 A. M., left Linnton (wharf). When arriving alongside Coal Bunkers, carried away dolphin composed of 7 piles.

11.50 A. M., fast alongside of coal bunkers.

3 P. M., finished coaling.

When leaving coal wharf struck sunken piles with propeller.

3.30 P. M., left Portland.

August 12th, 5.10 A. M., ship struck on sand bank. Full speed astern.

5.15 A. M., off sand bar.

August 15th, 4.30 P. M., Fast at Oakland wharf.

7

REPORT OF SURVEY.

This is to certify that at the request of the owners, I, the undersigned Marine Surveyor, did this day hold survey upon the above-named vessel for the purpose of ascertaining the extent of damage alleged to have been sustained by vessel fouling a dolphin in the Port of Portland, Oregon, and subsequently grounding in the Columbia River whilst on the voyage from Portland to San Francisco; vessel at time of survey then being on Dry Dock of the Moran Company, at Seattle, Washington.

By abstracts taken from the vessel's log, it appears that, after all cargo was on board, and whilst going into the bunkers for fuel coal, at the wharf of the Independent Coal & Ice Company at Portland, Oregon, on August 11th, 1906, at about 11.40 A. M., ship fouled a dolphin, striking same with bluff of starboard bow, carrying away said dolphin but doing no apparent damage to vessel; at about 3.15 same day, when leaving bunkers for sea, and whilst turning, vessel struck snag with propeller, which sent a heavy shock through ship and machinery and at the

8 Report of Survey—Cont'd.

same time carried away one of the propeller blades; proceeding down river, all going well until about 5.10 A. M., August 12th, when vessel in charge of Pilot struck on sand bar; engines were immediately stopped and reversed, ship coming off without assistance about 5.15 A. M., proceeded to Astoria, arriving

at that port 6.20 A. M., same day and let go anchor.

After making an examination and finding the vessel apparently undamaged, the Master decided to proceed on his voyage to San Francisco, arriving in that Port without further mishap, discharged and returned to Seattle, Washington, arriving in latter Port about 7.15 P. M., August 29th, when ship immediately proceeded to Dry Dock.

For further particulars of the voyage, see Ship's Log and Protest.

Upon making a careful examination of the vessel on Dry Dock, I found the damage to consist as follows:

One blade of propeller entirely gone, being broken off close to base.

Several rivets in starboard bottom No. 1 Tank, leaking badly.

Report of Survey—Cont'd.

9

About 500 rivets located on both sides of flat of bottom forward of Collision Bulkhead, more or less started and weeping.

Paint scraped and chafed in various spots on both sides for a distance of about 35 feet from stem.

Cement cracked and started in fore peak tank.

RECOMMENDATIONS.

I recommend that one new propeller blade be installed.

That the badly leaking rivets, about 9 in all, in No. 1 Tank, be backed out and replaced by new and cement over same be renewed.

That the paint where same was damaged, be renewed with composition paint.

I further recommend that 500 more or less leaky and slightly started rivets and the started cement in the forepeak tank be not dealt with at this time, but that same be renewed at an early opportunity, said leaky rivets and cement in no way affecting the vessel's seaworthiness.

10 Report of Survey—Cont'd.

All of the above recommendations were carried out to my entire satisfaction; in my opinion, the vessel is now in a seaworthy condition and fit to carry dry and perishable cargo.

Respectfully submitted,

(Signed) F. WALKER,

Marine Surveyor.

Seattle, Washington,

August 30th, 1906.

11

REPORT OF SURVEY ON DOLPHIN.

Portland, August 14, 1906.

Messrs. Globe Navigation Co.,

Seattle, Wash.

Dear Sir:—

In compliance with the request contained in your telegram of this date, I beg to say that upon receipt of same I at once visited the wharf of the Independent Coal & Ice Co., and found the damage caused by the S. S. "Meteor" on Saturday last, to consist of the destruction of one mooring dolphin, said dolphin being formed by one center pile and six bracing piles all bound together at top by steel wire rope.

It appears that the "Meteor" struck this dolphin, stem on, breaking piles off at the bottom and scatter-

ing same, thus necessitating an entire new dolphin being driven. The piles are about 14' diameter at butt and 65 ft. in length. I estimate the cost of drivers and building new dolphin to be from \$100 to \$125.

Trusting the above will be satisfactory.

Very truly yours,

(Signed) F. WALKER.

12

COPY OF A LETTER FROM THE SURVEYOR.

Messrs. Globe Navigation Co.,
Seattle, Wash.,

Dear Sirs:—

S. S. "Meteor."

As requested by you to prepare an estimate of the cost of renewing about 500 rivets in bottom of this vessel and repairing cement in fore peak tank as recommended by me in Survey Report dated, August 30th, 1906.

I beg to hand you my estimate as follows:

500 rivets, together with cement over same,	
variously located.	\$1000.00
Cement in Fore Peak Tank	75.00
Extra Dockage—4 lay days	920.40
	<hr/>
	\$1995.40
	<hr/>

Very truly yours,

(Signed) F. WALKER,

Marine Surveyor.

Tacoma, Washington,
Feb. 11th, 1907.

Messrs. Johnson & Higgins,
Seattle, Wash.

Dear Sirs:—

S. S. "Meteor."

As verbally requested by you to explain the report of survey upon this vessel, particularly in regard to a number of rivets found slack in vessel's bottom after vessel stranded in the Columbia River on Aug. 12th, 1906, and also regarding a number of rivets found slack in the braces, etc., of Fore Peak after vessel had been in collision with the "Ada Warren" in San Pablo Bay on the 11th of Oct. 1906; I beg to state that these are entirely distinct damages, the loose rivets in the collision case were all located in the braces, stringers and panting beams in the Fore Peak and all above water; the loose rivets in the stranding case are all located in flat of bottom and all under water, necessitating the docking of vessel to make the needed repairs and as vessel did not dock at time repairs were made after collision with "Ada
12b

Warren," it was impossible to carry out both repairs at same time.

In reply to your inquiry as to what I base my estimate upon, for renewing the 500 rivets in bottom of ship I beg to refer you to the bills in case of the S. S. "Tampico," a sister ship with exactly the same damage, the bills I believe you have in your records, you will find that the lowest tender we received for renewing rivets in that ship's bottom, Feby. of last

year, was \$1.97 per rivet, occupied 5 days and one night to renew 317.

In regard to this I wish to explain that this is not ordinary riveting but troublesome and difficult work, taking a long time to each rivet, in the first place the cement has to be chipped away from each rivet, in the second place, they are badly scattered and necessitate the continual moving of men and tools, to say nothing of the long distance the hot rivets must be passed, as they cannot be heated in the tanks.

In making my estimate, I allowed \$2.00 per rivet,
12c

as I am confident that we shall find quite a few awkward and large Top rivets to renew at point where the cast steel stem joins the keel and these will cost considerably more than ordinary rivets. I am also confident that we shall find far more loose rivets than the original 500 as in estimate:—in estimating the time required on dock, I went by the time occupied in renewing rivets in the bottom of S. S. “Tampico.” I stood by this latter job day and night and used every effort to get the vessel off the dock quickly; the men worked well but only averaged about 65 rivets per day; there were two gang employed in riveting, with about 7 extra men employed in passing rivets, etc., therefore as the rivets needed in the bottom of the S. S. “Meteor” are not quite so badly scattered as those in the “Tampico,” I have allowed that 100 per day will be about right for two gangs with their extra help, this being about all the men that can be used to advantage in doing the work unless the owners elect to work night and day, then a double shift

can be used and the lay days on dock reduced in proportion.

Yours very truly,

(Signed) F. WALKER.

I hereby certify that I attended the repairs to the S. S. "Tampico" referred to in this letter and am well acquainted with the S. S. "Meteor" and location of the loose rivets. I have examined Mr. Walker's estimate for repairs and in my opinion consider same fair and reasonable.

(Signed) JAMES FOWLER,
Surveyor to Lloyds Register.

13

AFFIDAVIT OF MASTER.

T. D. McFarland, being duly sworn, deposes and says:

That he is Captain of the American Steamer "Meteor" owned by the Globe Navigation Company.

That on Thursday morning, October 11th at 4:42 a. m., while the vessel was proceeding from Port Costa to Richmond a green light was discovered off the port bow of the steamer about 11½ miles distant. That having the right of way, under the local rules, the "Meteor" held her course. Both vessels continued until seeing that the other vessel was not changing her course, as she should have done, and seeing there was danger of collision, the deponent started to put his helm to starboard to change his course to port to avoid collision, and had started to blow his whistle to give notice to this effect when suddenly the other vessel, which subsequently proved to

be the Tug Boat "Ada Warren" with barge alongside, blew one whistle and changed her course, showing a red light. (At this time of changing his course when he started to give two blasts of his whistle, the

14

Affidavit of Master, Cont'd.

deponent had already pulled the whistle cord and a short blast had been given before the change of course of the "Ada Warren" was noticed.)

Immediately the red light was seen, the engines were ordered full speed astern and three short blasts given to indicate this procedure. The "Ada Warren" seemed to continue on her course, and within about two minutes struck the "Meteor" on the port bow, doing considerable damage to the "Meteor" and sustaining damage herself.

That at the time of the collision, in the opinion of the deponent, the "Meteor" had practically lost her headway.

That at the time of the collision, Second Officer Look and Quartermaster Harry Johnson were on the bridge with the deponent.

(Signed) T. D. McFARLAND.

Subscribed and sworn to before me this 12th day of October, 1906.

15

REPORT OF SURVEY AT SAN FRANCISCO.

At the request of Messrs. Johnson & Higgins, the undersigned made a survey of damages sustained by the American S. S. "Meteor" said ship having been in collision with the Tug "Ada Warren," and a barge in tow. See Report of Master.

I found the port bow of the "Meteor" dented in approximately one foot in depth and extending 7 or 8 frame spaces in length and 4 to 6 feet in height.

By examination of the damaged parts, I found 5 frames cracked on their inner edges but not extending through the frame. The outside plating or skin of the ship is not broken and its riveting does not appear seriously strained.

The port hawse pipe is forced somewhat at the bottom and pushed up through the deck.

The riveting of the bulwark plate to sheer strake is sheared for about six feet.

The deck stringer plate appears uninjured, the main injury being between the first stringer below deck and the top of the fore peak tank.

16 Report of Survey at San Francisco, Cont'd.

The stringer is bent and the breast hook in same crimped as is also the top of the peak tank.

Abaft the collision bulkhead, I found another dent in the side (below sheer strake) apparently 4" to 6" deep.

Inside I found the fourth frame abaft the bulkhead slightly bent and the fifth and sixth frames set in apparently about 4".

The outside skin dented in the most in the sixth frame space and near the center of a plate that is approximately 7½ ft. by 16 ft.

After careful examination of the damage I find it to be all above the present water line, that the skin appears unbroken, that the riveting does not appear seriously strained and the frames where cracked have yet a large portion of strength.

The ship is partly loaded and bound for a home port on Puget Sound and in my opinion is in a safe and seaworthy condition for the voyage.

There would probably be slight leakage around the flange of the hawse pipe that could be drained into the peak tank and amply cared for by the pumps

Report of Survey at San Francisco, Cont'd. 17
from that tank.

The torn rivets in lower edge of bulwark plate, are above deck.

(Signed) I. E. THAYER,
Marine Surveyor.

San Francisco,

Oct 12th, 1906.

18

FIRST REPORT OF SURVEY AT TACOMA.

At the request of the Globe Navigation Company, Owners, I, the undersigned Marine Surveyor, have this day held survey upon the above named vessel for the purpose of ascertaining the extent of damage alleged to have been sustained whilst said vessel was in collision with the tug "Ada Warren" in San Pablo Bay, on the morning of the 11th day of October, 1906, vessel at time of survey then being at the dock of the Tacoma Smelting Company, Tacoma, Washington.

By abstracts taken from the vessel's log, it appears that at about 4.15 a. m., on October 11th, ship left Port Costa for San Francisco; that at about 4.42 a. m. vessel collided with the tug "Ada Warren" said tug having in tow a heavily laden rock scow,

both tug and scow striking the "Meteor" heavily on the port bow, badly denting and damaging plates and frames. Master at once sounded bilges and examined damage and found vessel to be making no water; therefore, after securing barge, took tug in tow and proceeded to San Francisco, arriving in that

First Report of Survey at Tacoma, Cont'd. 19
port and coming to an anchor about 10.10 a. m., same day; after vessel was duly surveyed and pronounced seaworthy to make the voyage to Puget Sound, ship proceeded and arrived in Tacoma without further mishap, at about 3.45 a. m., October 18th, 1906.

For full particulars of accident see Ship's Log. Protest and Survey Report of the S. F. Surveyors.

Upon a careful examination of the vessel, I found the damage to consist as follows—all of which being on port side.

Sheet Plates: .

Bulwark Plate—3rd. from stern.

Sheer Strake—1st, and second from stern.

First Strake below—1st, 2nd, and 3rd, from stem.

Second Strake below—do do

Third Strake below—do do

One small doubling plate on outside under hawse pipe.

One small doubling plate on inside in way of hawse pipe.

Making a total of 12 shell plates and two small doubling plates, all more or less dented and buckled;

20 First Report of Survey at Tacoma, Cont'd.

five of the shell plates being badly buckled and a great number of the butt and landing rivets started

and strained to shearing point.

Frames:

Eleven (11) Channel Frames in fore peak badly broken and bent.

Four (4) Frames abaft Collision Bulkhead badly bent, some of these damaged frames being forced inwards to the extent of (1) one foot.

Stringers:

Tween Deck, Orlop Deck and angle Side Stringers badly buckled from stem to collision bulkhead.

Breast Hooks:

Hook Plate at Tween Deck Stringers, Side Stringers and Orlop Deck Stringer badly buckled and broken.

Collision Bulkhead:

Bounding bar slightly bent and many rivets started in same.

First Report of Survey at Tacoma, Cont'd. 21

Hawse Pipe:

Which is of steel, is badly bent and forced up, cast iron collar on main deck broken and one on ship's side started.

Panting Beams and Loose Rivets:

Panting beams adrift at both ends and many rivets in braces and stringers started and strained—estimated quantity about 500.

Anchor:

Shank of port bower anchor badly bent.

RECOMMENDATIONS.

I recommend that the above enumerated damage be made good as per attached specifications, said specifications to form a part of this Report.

The damaged anchor which is not included in the specifications for Hull Repairs, I recommend be straightened, if possible, if not, that a new anchor of same design, material and weight, be purchased and installed.

22 Report of Survey at Tacoma, Cont'd.

I further recommend that all repairs be made by contract and that competition bids be obtained for same.

Respectfully submitted,

(Signed) F. WALKER,

Marine Surveyor.

Tacoma, Washington, October 18th, 1906.

23

SPECIFICATIONS FOR REPAIRS.

Port Side:

The following plates to be removed, faired and returned if practicable, if not, same to be renewed.

Bulwark Plate—3rd. from stem.

Sheer Strake—1st. & 2nd, from stem.

First Strake below—1st, 2nd, & 3rd, from stem.

Second “ “ do

Third “ “ do

Small doubling plate outside under hawse.

Pipe and doubling plate on inside, in way of hawse pipe also to be removed, faired and returned, making a total of 12 shell plates and two doubling plates to be dealt with.

Note: Any of the above plates or other work that can be faired in place, same will be permitted.

Frames:

Eleven frames in fore peak, the forward two being

of the usual type of main and reverse frames, the re-

24 Specifications for Repairs, Cont'd.

remainder being channel frames, to be cut out and renewed alternately above and below the orlop deck stringer and up to main deck, commencing with the first frame forward which is to be cut below said stringer for the main frame and the reverse frame at least four (4) feet below cut in main frame, the cuts in channel frames to be at least four (4) feet above and below each other, angle bosom straps of at least 3' 6" in length to be fitted to the forward main frames and channel back plates of about four (4) feet in length to be fitted in way of splices in channel frames, together with $\frac{3}{8}$ " flat plates of same length on inside of channels, the riveting of splices to be the usual practice about 4" centers, staggered.

Four channel frames, 4th, 5th, 6th, and 7th, abaft the collision bulkhead, to be cut out below the Tween Deck Stringer Plate, faired and returned, cuts to be staggered and spliced as called for above.

Stringers:

Tween Deck Stringer Plate and Orlop Deck Stringer Plate in way of damages, to be cut adrift, faired and refastened, one double angle stringer located above Tween Deck stringer to be set out, faired

Specifications for Repairs, Cont'd. 25

and returned. Margin angles of these stringer plates also to be faired and refastened.

Breast Hooks:

Hook plate Tween Deck Stringer together with one above and one below, to be cut out and replaced with new.

Collision Bulkhead:

To be cut adrift at margin from main deck down to Orlop deck stringer, re-riveted, caulked and made tight.

Hawse Pipe:

To be removed, faired up and returned. Cast iron collar on deck to be renewed and deck in way of same faired up. Cast iron collar on ship's side to be removed, and if found broken, to be renewed, if not, to be returned, reriveted and made tight.

Panting Beams and Loose Rivets:

Panting Beams in forepeak to be re-riveted at ends and about 500 loose rivets variously located in

26 Specifications for Repairs, Cont'd.

forepeak to be backed out and replaced by new.

Caulking:

After all plates are returned, the caulking of all seams, laps and butts from stem to about 40 feet aft, on both sides is to be carefully gone over and made tight.

Painting and Cementing:

All new work to receive two coats of good oil paint in colors as desired; all old work that has been dealt with, to receive one coat of paint as desired, and on inside of fore peak tank, same is to be cement washed throughout with two coats and cement repaired where same is broken.

CONDITIONS.

Owing to vessel being under Charter, time is an important factor in this case, therefore contractor must bind himself to complete all work and turn

vessel back to owners in fifteen working days from date that vessel is delivered at place that will be agreed upon; it is now expected that vessel will be

Specifications for Repairs, Cont'd. 27

in readiness to receive repairs not later than Monday, the 22nd. day of October, 1906.

In connection with the above clause, it is to be distinctly understood that demurrage of one hundred and fifty dollars (\$150.00) per day will be paid by the contractor to the owners for each and every day of 24 hours that vessel may be detained by him or them over and above specified number of days, barring strikes, lockouts and acts of God beyond his or their control, a bonus of seventy-five dollars (\$75.00) per day of 24 hours will be paid by owners to contractors for each and every day saved from specified number of days.

Contractor must be prepared to furnish surety bond for faithful performance of the work, amount of bond to be not less than 50% of contract price.

All work to be carried out in a first class and workmanlike manner to the satisfaction of owner's representative and surveyor appointed.

All wood or iron work that may be necessary to be removed for the proper performance of the work,

28 Specifications for Repairs, Cont'd.

to be removed and returned in as good condition as before, at the contractor's expense. All dirt and rubbish that may be accumulated during course of repairs to be removed from the ship by the contractor.

No extras of any nature whatsoever, will be al-

lowed unless previously agreed upon in writing, between parties interested.

All new material used in making the above repairs is to strictly conform with the present scantlings of vessel.

Should it be found necessary to dock vessel in order to effect the herein described repairs, the cost is to be borne fully by contractor.

Sealed tenders for the full and complete performance of the work in accordance with these specifications, to be submitted to the Globe Navigation Company, at their office, Globe Block, Seattle, Washington, by 11 a. m., Saturday the 20th day of October, 1906, when same will be opened in presence of parties interested.

The right is hereby reserved by owners to reject any or all tenders.

Tacoma, Washington, Oct. 18th, 1906.

29

FINAL REPORT OF SURVEY AT TACOMA.

This is to certify that I, the undersigned Marine Surveyor, have this day held survey upon the completed repairs to the above-named vessel and find all recommendations made by me in Survey Report, dated October 18th, 1906, have been carried out to my entire satisfaction.

In my opinion the vessel is now in a good and seaworthy condition, being fit to carry dry and perishable cargo.

Respectfully submitted,

(Signed) F. WALKER,

Marine Surveyor.

St. Helens, Oregon.

Nov. 15th, 1906.

30

BID FOR REPAIRS.

Seattle, Wash.,

October 20th, 1906.

Globe Navigation Co.

Seattle, Wash.

Gentlemen:

We submit proposal to make repairs to hull, S.S. "Meteor," as per specifications furnished, for the sum of \$9875.00.

Work to be completed in fifteen days from date ship is turned over to us in Seattle.

Yours very truly,

(Signed) STANDARD BOILER WORKS.

By GEO. F. BARRITT.

Other bid received:

The Moran Company \$12569.

31

ACCEPTANCE OF BID FOR REPAIRS.

October 22nd, 1906.

Messrs. Standard Boiler Works,

City.

Gentlemen:

We hereby accept your tender of October 20th, 1906, to make repairs to our steamer "Meteor" in accordance with specifications bearing Tacoma, date of Oct. 18th, 1906.

It is our understanding that the lay days according to specifications and your tender, begin this Monday morning, at 7:00 o'clock.

We will be obliged if you will arrange to file bond in accordance with specifications in the sum of \$5000.00. Please first submit form for the approval of our attorney.

Yours very truly,

(Signed) GLOBE NAVIGATION COM-
PANY, LT'D.

CHARGES & EXPENSES

34

—Disbursements,—

\$536.05 The Moran Company

By Mr. Thorndyke.

For docking vessel and repairs to pro-
peller:

Docking vessel 2301 gross tons....@	.20	460.20
Machinist48 hrs.	.60	28.80
Helpers41 "	.40	16.40
Dockman6 "	.60	3.60
Dockman12 "	.35	4.20
Pattern maker1 "	.60	.60
5 gals. Anti-corrosive.....@	2.50	12.50
25# Red Lead Putty.....	.15	3.75
10# Smooth on Cement.....	.35	3.50
Fresh water for washing hull.....		2.50

536.05

Forward

\$536.05

Particular
Average.
Aug. 11.

\$ 460.20
28.80
16.40
3.60
4.20
.60
12.50
3.75
3.50
2.50

\$ 536.05

36

Owners.

Particular
Average
Aug. 11.
\$ 536.05

\$ 4.80
2.80
.32
.12

\$ 8.04

Disbursements, Cont'd.

\$ 536.05	Forward	
106.10	The Moran Company	
	Nerbal. By Mr. Thorndyke.	
	For making 1 C. I. Propeller blade as per	
	pattern on hand:	
	Machinist 14½ hrs.	.60 8.70
	" " " " " " " " " " " "	.40 2.
	Helpers 5	.06 95.40
	1 C. I. Propeller blade 1590 lbs.....	
		<u>106.10</u>

118.49 The Moran Company.

	For repairs to sounding pipes:	
	Steamfitter 8 hrs.	.60 4.80
	Helper 7	.40 2.80
	1-1¼" Flange Union.....	.32
	4-1½" x 1½" Cap screws.....	.03 .12
	Repairs to bottom:	
	Shipfitters 24 hrs.	.60 14.40
	Helpers 23	.40 9.20
	24-¾ x 1-7/8 rivets 10½ #.....	.05 .53
	Forward	<u>32.17</u>
	Forward	
\$ 760.64		\$ 666.28
		<u>\$ 8.04</u>

40			41
	Disbursements, Cont'd.	Particular Average Aug. 11.	Owners.
\$ 760.64	Forward		
85.	Independent Coal & Ice Company.		
	For driving one 7 pile dolphin.....		\$ 93.36
	Drawing old piles		
			\$ 85.
10.	F. Walker.		
	For Survey and Report damaged piles—In-		
	dependent Coal & Ice Company, Portland,		
	Oregon. Date of Survey, August 14th,		
	1906.	10.	
35.	F. Walker.		
	For Survey, Report and attendance on Dry		
	Dock, August 29th, and 30th, 1906.....	35.	
	Forward	\$ 702.28	\$ 93.36
\$ 890.64			

44	Disbursements, Cont'd.	General Average.	Particular Average Oct. 11.	45 Owners.
\$ 11.20	G. F. Thorndyke.			
	For expenses of trips to Tacoma account Collision Damage	11.20	\$ 11.20	
20.	I. E. Thayer, Surveyor.			
	For Survey of damages at anchorage, and Report	20. \$ 20.		
7.12	Postal Telegraph Cable Company.			
	For Telegrams	7.12 1.28	4.36	\$ 1.48
254.	Standard Boiler Works.			
	For fares, meals, lodging and Continued			
\$ 292.32	Forward	\$ 21.28	\$ 15.56	\$ 1.48

46

Owners.

\$ 1 48

47

Particular
Average
Oct. 11.

\$ 15.56

General
Average.

\$ 21 28

Disbursements, Cont'd.

Forward

\$ 292.32

Standard Boiler Works, cont'd.
travelling time Seattle to Rainier, Oregon,
and return,
For Nov. 9. 5 Fares to Rainier..... 24.50
10 meals 2.50
3 Boiler makers 1½ days ea.—4½ 27.
2 Helpers 1½ days each—3.... 12.
Lodging & meals, Rainier..... 16.75
do. St. Helens..... 20.50
Nov. 16. 5 Fares to Portland..... 5.
3 B. M. night 1 day ea.—3..... 18.
2 Helpers. 1 " —2 8.
Nov. 17. 3 B. M. 1 " —3 18.
2 Helpers 1 " —2 8.
Nov. 18. 5 Fares to Seattle..... 28.
3 B. M. Sunday 2 days ea.—6..... 36.
2 Helpers 2 " —4 16.
Meals and Lodging at Portland.... 11.25
Meals Sunday 2.50

254.

\$255.48

\$ 15.56

\$ 21 28

Forward

\$ 292.32

48

Disbursements, Cont'd.

General Average.

Particular Average Oct. 11.

Owners.

\$ 255.48

\$ 292.32

Standard Boiler Works.

Forward

\$ 21.28

\$ 15.56

For repairs to hull, port side forward, as per Contract 9875.
Anchor stock removed, faired and returned. 34.80
Work at Rainier & St. Helens, Oregon:
Nov. 10. Boiler maker 3 days 18.
Helpers 2 " 8.
Nov. 11. 3 Boiler makers Sunday 2 days ea.—6 36.
2 Helpers 2 days ea.—4 16.
Nov. 12. 3 Boiler makers 1 day each—3 days 18.
2 Helpers..... 1 do. 2 " 8.
Nov. 14. 2 Boiler makers. 1 do. 3 " 18.
2 Helpers..... 1 do. 2 " 8.
Nov. 15—3 Boiler makers. $\frac{1}{2}$ do. 1 $\frac{1}{2}$ " 9.
2 Helpers $\frac{1}{2}$ do. 1 " 4.
Nov. 16. —3 Boiler makers. $\frac{1}{2}$ do. 1 $\frac{1}{2}$ " 9.
2 Helpers $\frac{1}{2}$ do. 1 " 4.

10065.80

9909.80

156.

Note: No credit could be obtained for the old materials.

\$10358.12

Forward

\$ 21.28

\$9925.36

\$411.48

[In pencil:]
.50
9909.80

50	Disbursements, Cont'd.	Particular Average Oct. 11.	51 Owners.
\$10353.12	Forward	\$ 9925.36	\$ 411.48
150.	F. Walker, Surveyor.		
	For Surveys, Reports, Specifications and attendance during course of repairs, cov- ering dates October 18th, to November 15th, 1906.	150.	
25.	H. R. Clise, Attorney at Law.		
	For services in connection with collision on behalf of Globe Navigation Co.	25.	25. [In pencil:] Unadj. % Segal To be adj. later.
	Note: Pending final decisions, charge to Owners.		
.53	For Commission for advancing General Average Funds2½%	.53	
\$10533.65	Forward	\$10075.36	\$ 436.48

52
53
Owners.
\$ 436.48

Particular
Average
Oct. 11.—
\$ 10075.36
General
Average.
\$ 21.81

Allowance.

Forward

\$10533.65

142.38 Allowance.

For Wages and Provisions of Master and
Crew during the extra detention at San
Francisco from Oct. 11th, to Oct. 13th,
2 days.

Wages:—

Master	per month	\$ 166.66
1st. Officer		90.
2nd. Officer		75.
Carpenter		50.
8 Seamen @ \$45.00 each.....		360.
Chief Engineer		150.
1st. Asst. "		90.
2nd. " "		75.
3rd. " "		65.
3 Firemen @ 50.00 each.....		150.
3 Oilers @ 40.00 each		120.
3 Coal passers @ 40.00 each..		120.
Cook		90.
3 Waiters @ 30.00 each.....		90.
Forward		\$1691.66

\$10676.03

Forward

\$ 21.81

\$ 10075.36

\$ 436.48

54							55
	Allowances, Cont'd.						Owners.
\$10576.03	Forward	\$ 21.81	\$10075.36			\$ 436.48	
	Allowances for Wages & Provisions, cont'd.						
	Forward \$1691.66						
	For 2 days	112.78					
	Provisions:						
	Master per diem	\$ 1.50					
	6 Officers @ 75¢ per diem....	4.50					
	22 Men @ 40¢	8.80					
		<u>\$ 14.80</u>					
	For 2 days	29.60					
		<u>142.38</u>	142.38				
4.91	Allowance:						
	For Interest on General Average Disbursements and Allowances during the estimated period of outlay @ 6 % per annum	4.91	4.91				
2886.04	Disbursements Brought Forward from Pages 42 & 43		\$ 2697.68	\$95.		93.36	
\$13566.98	Forward	\$ 169.10	\$ 10075.36	\$95.		\$ 529.84	

	[In pencil:] Meteor Warren Meteor Prop. Blade	General Average.	[In pencil:] Meteor Portland Dock #48 Protection Claim.	Owners.
	Oct. 11.	Aug. 11.		
\$ 13566.98	Forward \$ 169.10			\$ 529.84
20.99 For Telegrams	20.99 6.	14.99		
46.20 Dakin Publishing Company.				
	For copies of this statement.....	46.20 1.20	25. 20.	
135. For this Adjustment	135.	5. —	85. 40.	5.
9.07 Commission for collecting and settling Gen-eral Average	9.07 5%	9.07—		
	General Average	\$190.37		
	Particular Average, Oct. 11th.	\$10200.35		
	Particular Average August 11th.,	\$2757.68		
	Protection Claim.		\$100.	
	Owners.			\$529.84
\$ 13778.24			[In pencil]: 10200. 2757.68 290.37	13248.05

Contributing Interest and Apportionment of General Average

Vessel:		
Value in Sound Condition.....	\$120000.	
Less Cost of Repairs.....	12315.20	
	<u>\$107684.80</u>	107685.
		\$ 126.50
Freight:		
At risk	\$ 4057.	
Less Wages and Port Charges.....	994.56	
	<u>\$ 3062.44</u>	3062.
		3.60
Cargo:		
Tacoma Smelting Company.....	\$ 7580.04	7580.
		8.90
American Smelters Securities Company.....	\$ 43726.20	43726.
		51.37
		<u>\$ 190.37</u>

Seattle, Wash.

February 20th, 1907.

JOHNSON & HIGGINS,
Average Adjusters.

Or. O. 117474%

**[Libellant's Exhibit "B"—Bill of "Meteor" to
Standard Boiler Works.]**

[Letter-head of Standard Boiler Works.]

Seattle, Wash., Nov. 24, 1906.

S. S. METEOR and OWNERS.

**FARES, MEALS, LODGING and TRAVELING TIME, SEATTLE to
RAINIER, OREGON and return.**

Nov. 9. Friday	To 5 Fares to Rainier				24.50
	10 Meals				2.50
	3—Boilermakers	1½ Da.	Ea.	4½ Days	27.00
	2—Helpers	1½ "	"	3 "	12.00
	Lodging & Meals, Rainier				16.75
	" " St. Helens				20.50
16. Friday	5 Fares to Portland				5.00
	3—B. M. Night	"	1 Ea.	3 Days	18.00
	2—H.	"	1 "	2 "	8.00
17. Sat.	3—B. M.	"	1 "	3 "	18.00
	2—H.	"	1 "	2 "	8.00
18. Sund.	5 Fares to Seattle				28.00
	3—B. M. Sunday	2 "	6 "		36.00
	2—H.	2 "	4 "		16.00
	Meals and Lodging Portland				11.25
	" Sunday				2.50
					<hr/> 254.00

O. K.

B.

O. K.—F. WALKER,

Marine Surveyor.

Paid Nov. 27/06.

STANDARD BOILER WORKS.

By G. F. BARRITT.

**[Endorsed]: Libellant's Exhibit "B." N. W. B.,
Notary.**

No. 2267. U. S. Circuit Court of Appeals for the
Ninth Circuit. Libellant's Exhibit "B." Received
Apr. 15, 1913. F. D. Monckton, Clerk.

[Libelant's Exhibit "C"—Bill of "Meteor" to
Standard Boiler Works.]

[Letter-head of Standard Boiler Works.]

Seattle, Wash., Nov. 24, 1906.

S. S. METEOR and OWNERS.

REPAIRS to HULL; PORT SIDE FOR'D As
per contract 9875.00

ANCHOR STOCK Removed, Faired and Re-
turned 34.80

WORK at RAINIER & ST. HELENS, OREGON:

Nov. 10. Sat.	To 3—Boilermakers	1 Day Ea.	3 Days	18.00	
	2—Helpers	1	" " 2 "	8.00	
11. Sun.	3—B. M. Sunday	2	" " 6 "	36.00	
	2—H. "	2	" " 4 "	16.00	
12. Mon.	3—B. M.	1	" " 3 "	18.00	
	2—H.	1	" " 2 "	8.00	
14. Wed.	3—B. M.	1	" " 3 "	18.00	
	2—H.	1	" " 2 "	8.00	
15. Thurs.	3—B. M.	$\frac{1}{2}$	" " $1\frac{1}{2}$ "	9.00	
	2—H.	$\frac{1}{2}$	" " 1 "	4.00	
16. Frid.	3—B. M.	$\frac{1}{2}$	" " $1\frac{1}{2}$ "	9.00	
	2—H.	$\frac{1}{2}$	" " 1 "	4.00	156.00
					<hr/> 10065.80

O. K.
B.

O. K.—F. WALKER,
Marine Surveyor.

Paid Nov. 27th/06.

STANDARD BOILER WORKS,
By G. F. BARRITT.

[Endorsed]: Libellant's Exhibit "C" NWB.,
Notary.

No. 2267. U. S. Circuit Court of Appeals, for the
Ninth Circuit. Libelant's Exhibit "C." Received
Apr. 15, 1913. F. D. Monckton, Clerk.



SAN PABLO BAY
CALIFORNIA

100

1

10

100

REFERENCES



[**Libelant's Exhibit "D"—Letter Dated San Francisco, September 21, 1906, Globe Navigation Company, Ltd., to Messrs. Chas. R. McCormick & Co.]**

San Francisco, Cal., Sept. 21, 1906.

Mess. Chas. R. McCormick & Co.,

CITY.

Gentlemen:

We beg to confirm verbal charter to you of Str. "METEOR" as follows:

Soon as vessel has completed voyage she is now on she is to proceed to Puget Sound or Columbia River to load a full cargo of sawn lumber and/or R. R. ties.

You to name either of the above loading ports within the next ten days and at the same time to name port of discharge.

You have the option of loading the vessel at two places either on Puget Sound or on the Columbia River, but vessel not to make both Columbia River and Puget Sound for loading.

You to furnish vessel with cargo for loading in six (6) working days, or demurrage at the rate of ten dollars (\$10.00) per hour. Cargo to be delivered along side of vessel, either on barges or wharf, at some point where she can safely lie afloat at all stages of the tide.

Vessel to receive usual steamer dispatch at Port of Discharge at such place as she will be always afloat.

None of the cargo to be loaded below deck to be over twenty four feet in length.

If cargo is delivered at San Francisco freight

seven dollars and twenty five cents (\$7.25) per M ft. B. M., if delivered at Redondo or San Pedro eight dollars (\$8.00) per M. ft. B. M.

Freight payable here on receipt of certificate of discharge of cargo, also demurrage if any.

Yours very truly,
GLOBE NAVIGATION CO. LTD.,
per J. H. BAXTER.

Accepted.

CHAS. R. McCORMICK & CO.

[Endorsed]: Libelant's Exhibit "D." N. W. B.,
Notary.

No. 2267. U. S. Circuit Court of Appeals for the
Ninth Circuit. Libelant's Exhibit "D." Received
Apr. 15, 1913. F. D. Monckton, Clerk.

[Libelant's Exhibit "D" (No. 13,648)—Findings of
O. F. Bolles and John K. Bolles, United States
Local Inspectors.]

DEPARTMENT OF COMMERCE AND LABOR.
STEAMBOAT-INSPECTION SERVICE.

Office of Local Inspectors,
San Francisco, Cal.

February 12, 1907.

IN THE MATTER OF THE COLLISION BE-
TWEEN THE STEAMER "METEOR," AND
TUG "ADA WARREN," WITH BARGE IN
TOW, IN CARQUINEZ STRAITS, CALI-
FORNIA, OCTOBER 11, 1906.

From the evidence taken at the investigation of
this case, we find that the steamer "METEOR," T.

D. McFarland, Master, was being *navigated on that occasion without a licensed pilot* in charge, as required by Section 4401, U. S. Revised Statutes, and refer the same to the U. S. Collector of Customs for the Port of San Francisco.

We also find from the evidence taken in the above entitled matter, that the tug "ADA WARREN" was in charge of pilot William T. Oden, at the time of the collision; and we are satisfied that he was negligent in navigating said vessel on that occasion, inasmuch as he violated Rule III, of the Pilot Rules for Atlantic and Pacific Coast Inland Waters, in *not blowing four blasts of the steam whistle, when, as he testified, the "METEOR" blew two blasts of the whistle after the ADA WARREN had blown one blast.*

For such negligence on the part of William T. Oden, we hereby suspend his license as Master and Pilot of Steam Vessels for a period of thirty days from date hereof.

[In pencil]: Capt. Hansen.—Barge heavy to handle for Ada W.?

O. F. BOLLES,
JOHN K. BULGER,
U. S. Local Inspectors.

[Endorsed]: Nos. 13,602–13,648. Globe Nav. Co. v. Tug "Ada Warren." Warren Imp. Co. vs. S. S. "Meteor." Libelant's (13,648) Exhibit "D." Francis Krull, Deputy Clerk.

No. 2267. U. S. Circuit Court of Appeals, for the Ninth Circuit. Libelant's Exhibit (13,648) D. Received Apr. 15, 1913. F. D. Monckton, Clerk.

[Libelant's Exhibit "E"—Telegram Dated San Francisco, October 12, 1906, J. H. Baxter to Globe Navigation Company, Ltd.]

[Written on Blank of Postal Telegraph-Cable Company.]

234.0a.s. 11 an ans 2 51 p.

Sanfrancisco, Oct. 12, 1906.

Globe Nav. Co. Ltd.

Globe Bldg Seattle.

McCormick refuses permission until he knows how long Meteor delayed repairing.

J. H. BAXTER.

[Endorsed]: Libellant's Exhibit "E." NWB. Notary.

No. 2267. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelant's Exhibit "E." Received Apr. 15, 1913. F. D. Monckton, Clerk.

[Respondent's Exhibit No. 1—Letter Dated San Francisco, October 11, 1906, J. H. Baxter to Globe Navigation Company, Ltd.]

[Letter-head of J. H. Baxter.]

San Francisco, Oct. 11, 1906.

Mess. Globe Navigation Co. Ltd.,

Seattle, Wash.

Gentlemen:

I have for acknowledgment yours of the 8th inst., also your telegram of even date, which reads as follows: "METEOR OFFERED TWO THOUSAND

TONS COAL SEATTLE TOMPORTLAND TELE-
GRAPH IF MCCORMICK WILL PERMIT
NECESSARY DELAY WHEN SAILING." I
will see McCormick this afternoon and try to get
his permission to take the coal from Tacoma to
Columbia River, but I am not sure that he will grant
the same. He is in a great hurry for the vessel and
she has been delayed here a considerable length of
time by loading up freight and he does not feel any
too well towards Globe Navigation Co. on account
of them compelling payment of the bill for \$87.80
extra labor on "Meteor" last time she loaded for
him on Columbia River.

"Meteor" started from Port Costa this morning
for Point Richmond having on board of her about
2500 tons of ore and collided into a barge being towed
to Vallejo. Capt. McFarland states that the barge
and tow boat were entirely at fault and he has taken
immediate steps to inform the local inspectors here
and also made his report to Johnson & Higgins.
Capt? McFarland advised me that he wired you con-
cerning the accident as soon as he got ashore in San
Francisco. I expect him back to the office some time
G.N.C.#2. 10/11/06.

this afternoon and if there are any further develop-
ments of importance I will either wire you or have
the Captain wire you regarding same.

Yours very truly,

J. H. BAXTER.

[Endorsed]: Respondent's Exhibit No. 1. NWB.,
Notary.

No. 2267. U. S. Circuit Court of Appeals for the
Ninth Circuit. Respondent's Exhibit 1. Received
Apr. 15, 1913. F. D. Monckton, Clerk.

[Respondent's Exhibit No. 2—Five Sheets of Voyage Earnings and Expenses of S. S. "Meteor."]

GLOBE NAVIGATION CO., LTD.

VOYAGE EARNINGS AND EXPENSES

S. S. METEOR

Voyage 48

August 16, 1906.

GROSS EARNINGS. No. Bound. So. Bound. Total.

3230 50/2240 tons @ \$1.35.. 4,360.53 4,360.53

Total Gross Earnings 4,360.53 4,360.53

OPERATING EXPENSES.

MAINTENANCE OF HULLS AND CABINS:

1	Repairs of Hulls and Decks.....	133.81
2	Repairs of Equipment	
3	Repairs of Winches and Hoisting Apparatus	1.80
4	Repairs of Furniture, Draperies and Linen	5.50
5	Repairs of Sails and Rigging.....	
6	Paints, Oils and Maintenance Supplies....	21.36
7	Miscellaneous	3.75
8		
	Total	166.22

ENGINEER'S DEPARTMENT

9	Wages of Engineers, Firemen and Helpers.	321.80
	Fuel, (10) cost \$285.60 (11) Labor \$14.85.	300.45
12	Lubricating Oils	40.07
13	Paints and Oils	
14	Engine Supplies	13.15
15	Equipment	2.25
16	Repairs of Engines.....	21.99
17	Repairs of Boilers	
18	Repairs and Renewals of Tools	1.54
19	Miscellaneous	26.00
20		
	Total	727.25

STEWARD'S DEPARTMENT

21	Stores	289.24
22	Wages of Stewards, Cooks and Waiters...	72.00
23	Rep's & Ren's of Tableware, Linen & Galley Utensils	3.75
24	Board Money paid Crew	
25	Miscellaneous	10.56
26		
	Total	375.55

MISCELLANEOUS

27	Wages of Captain, Officers and Seamen...	293.20
28	Wages of Purser and Clerks	
29	Stevedoring	76.80
30	Dockage, Lighterage, Switching and Drayage	56.80
31	Dues, Tolls and Custom House Charges...	
32	Towage and Pilotage	
33	Damage to other Vessels and Docks	
34	Loss and Damage Claims	
35	Insurance on Cargo	
36	Insurance on Vessel	440.05
37	Other Expenses	4.65
38		
	Total	871.50

Total Operating Expenses.....2,140.52

Net Earnings2,220.01

Cargo: Coal.

OUTWARD

Sailed	From
June 30, 1906.	Seattle.
Arrived	At
July 4, 1906.	San Francisco.
Sailed	From

Arrived	At
---------	----

Cargo: Ballast.

INWARD

Sailed	From
July 7, 1906.	San Francisco.
Arrived	At
July 11, 1906.	Seattle.

Sailed	From
--------	------

Arrived	At
---------	----

RECORD OF VOYAGE

Days {	In Port 4½ days
	At Sea 7½ days
	Total 12 days

Knots Run 1.616.

Cost of Fuel per Knot .17		
	In	At
	Port	Sea
Loading at Seattle	1	
Seattle to San Fran.		4
Discharging at San Fran.	3½	
San Fran. to Seattle		3½
	4½	7½

Fuel consumption is abnormally low, account transfer of fuel to Voy. 49 at rate of \$4.75 per ton, being price paid at San Francisco for same.

Respondent's Exhibit No. 2.
(5 sheets). N. W. B., Notary.

[On reverse side:]

GLOBE NAVIGATION CO.
Limited

STATEMENT OF EARNINGS AND OPERATING EXPENSES

S. S. Meteor

Voyage 48

NEAL H. BEGLEY,

Auditor.

[Endorsed]: Case No. 2267. U. S. Circuit Court of Appeals, for the Ninth Circuit.
Respondent's Exhibit 2. Received Apr. 15, 1913. F. D. Monckton, Clerk.

GLOBE NAVIGATION CO., LTD.

VOYAGE EARNINGS AND EXPENSES

S. S. METEOR		Voyage 49	
GROSS EARNINGS.		No. Bound.	So. Bound. Total.
Coal 3171 784/2240 @ 1.50..			4,757.02
Piles 109117 'BM @ 7.00....		763.82	5,520.84
Demurrage			416.87
Sundry			20.00
Total Gross Earnings.			5,917.71

OPERATING EXPENSES.	
MAINTENANCE OF HULLS AND CABINS:	
1 Repairs of Hulls and Decks.....	46.55
2 Repairs of Equipment	66.07
3 Repairs of Winches and Hoisting Apparatus	41.67
4 Repairs of Furniture, Draperies and Linen	
5 Repairs of Sails and Rigging	30.06
6 Paints, Oils and Maintenance Supplies....	39.95
7 Miscellaneous	3.65
8	
Total	227.95

ENGINEER'S DEPARTMENT	
9 Wages of Engineers, Firemen and Helpers.	574.55
Fuel, (10) cost \$1024.04 (11) Labor \$16.50.1,040.54	
12 Lubricating Oils	
13 Paints and Oils	3.25
14 Engine Supplies	52.23
15 Equipment	
16 Repairs of Engines	58.05
17 Repairs of Boilers.....	
18 Repairs and Renewals of Tools.....	3.35
19 Miscellaneous	14.83
20	
Total	1,752.80

STEWARD'S DEPARTMENT	
21 Stores	155.93
22 Wages of Stewards, Cooks and Waiters...	129.00
23 Rep's & Ren's of Tableware, Linen & Galley Utensils	
24 Board Money paid Crew	
25 Miscellaneous	3.30
26	
Total	288.23

MISCELLANEOUS	
27 Wages of Captain, Officers and Seamen...	525.10
28 Wages of Pursers and Clerks	
29 Stevedoring	224.15
30 Dockage, Lighterage, Switching and Drayage	42.60
31 Dues, Tolls and Custom House Charges..	
32 Towage and Pilotage	76.30
33 Damage to other Vessels and Docks.....	
34 Loss and Damage Claims	
35 Insurance on Cargo.....	
36 Insurance on Vessel	677.00
37 Other Expenses	13.23
38	
Total	1,558.38

Total Operating Expenses3,827.36

Net Earnings2,090.35

October 17, 1906.	
Cargo: Coal and Piles	
OUTWARD	
Sailed	From
July 16, 1906.	Seattle.
Arrived	At
July 20, 1906.	San Francisco.
Sailed	From
Arrived	At

Cargo: Ballast.	
INWARD	
Sailed	From
July 27, 1906.	San Francisco.
Arrived	At
Aug. 1, 1906.	Columbia River.
Sailed	From
Arrived	At

RECORD OF VOYAGE

Days {	In Port 12½
	At Sea 9
	Total 21½

Knots Run 1,469

Cost of Fuel per Knot .517

	In Port	At Sea
Loading at Seattle	5½	
Seattle to San Fran.		4½
Disch'g at San Fran	7	
San Fran. to Col. River.		4½
	12½	9

[On reverse side:]

GLOBE NAVIGATION CO.

Limited

STATEMENT OF EARNINGS AND OPERATING EXPENSES

S. S. Meteor

Voyage 49

NEAL H. BEGLEY,

Auditor.

GLOBE NAVIGATION CO., LTD.

VOYAGE EARNINGS AND EXPENSES

S. S. METEOR	No. Bound.	So. Bound.	Total.
GROSS EARNINGS.			
Lumber, 1,660,712' @ \$5.50..		9,133.92	

Voyage 50

October 17, 1906.

Cargo: Lumber.

OUTWARD

Sailed	From
Aug. 11, 1906.	Col. River
Arrived	At
Aug. 15, 1906.	San Francisco
Sailed	From

Arrived At

Total Gross Earnings..... 9,133.92

OPERATING EXPENSES.

MAINTENANCE OF HULLS AND CABINS:

1 Repairs of Hulls and Decks.....	43.80
2 Repairs of Equipment	
3 Repairs of Winches and Hoisting Apparatus	106.00
4 Repairs of Furniture, Draperies and Linen.	
5 Repairs of Sails and Rigging.....	
6 Paints, Oils and Maintenance Supplies....	
7 Miscellaneous	7.69
8	
Total	157.49

ENGINEER'S DEPARTMENT

9 Wages of Engineers, Firemen and Helpers.	737.90
Fuel, (10) cost \$826.88 (11) Labor \$....	826.88
12 Lubricating Oils	32.30
13 Paints and Oils	
14 Engine Supplies	1.50
15 Equipment	
16 Repairs of Engines	13.10
17 Repairs of Boilers	
18 Repairs and Renewals of Tools.....	
19 Miscellaneous	9.88
20	
Total	1,621.56

STEWARD'S DEPARTMENT

21 Stores	566.96
22 Wages of Stewards, Cooks and Waiters....	165.00
23 Rep's & Ren's of Tableware, Linen & Galley Utensils	
24 Board Money paid Crew.....	
25 Miscellaneous	8.30
26	
Total	740.26

MISCELLANEOUS

27 Wages of Captain, Officers and Seamen..	669.45
28 Wages of Purser and Clerks	9.85
29 Stevedoring	1,566.95
30 Dockage, Lighterage, Switching and Drayage	28.40
31 Dues, Tolls and Custom House Charges....	
32 Towage and Pilotage	87.30
33 Damage to other Vessels and Docks.....	
34 Loss and Damage Claims	
35 Insurance on Cargo	
36 Insurance on Vessel	981.65
37 Other Expenses	68.49
38 Commissions	228.35

Total3,640.44

Total Operating Expenses6,159.75

Net Earnings2,974.17

Cargo: Ballast.

INWARD

Sailed	From
Aug. 25, 1906.	San Francisco
Arrived	At
Aug. 29, 1906.	Seattle.
Sailed	From

Arrived At

RECORD OF VOYAGE

Days {	In Port	20½ days
	At Sea	8 "
	Total	28½ "

Knots Run 1,459

Cost of Fuel per Knot 45¢
In Port

Loading at Columbia River ports 10

Portland to San Fran.
Disch'g. at San Fran. 10½
San Fran. to Seattle
20½

[On reverse side:]

GLOBE NAVIGATION CO.

Limited

STATEMENT OF EARNINGS AND OPERATING EXPENSES

S. S. Meteor

Voyage 50

NEAL H. BEGLEY,

Auditor.

GLOBE NAVIGATION CO., LTD.

VOYAGE EARNINGS AND EXPENSES

S. S. METEOR		Voyage 51	
GROSS EARNINGS.	No. Bound.	So. Bound.	Total.
Coal, 3274 2016/2240 @ 1.50		4,912.35	
Mdse, 10 tons		15.87	
Towage Barge "Chinook".		900.00	5,828.22
Ore, 1464 1650/2000@1.50.	2,197.24		2,197.24
Total Gross Earnings...	2,197.24	5,828.22	8,025.46

OPERATING EXPENSES.

MAINTENANCE OF HULLS AND CABINS:	
1 Repairs of Hulls and Decks	63.24
2 Repairs of Equipment	178.82
3 Repairs of Winches and Hoisting Apparatus	
4 Repairs of Furniture, Draperies and Linen	
5 Repairs of Sails and Rigging	2.64
6 Paints, Oils and Maintenance Supplies....	43.19
7 Miscellaneous	18.00
8	
Total	305.89

ENGINEER'S DEPARTMENT

9 Wages of Engineers, Firemen and Helpers.	656.80
Fuel, (10) cost \$1060.57 (11) Labor \$8.10..	1,068.67
12 Lubricating Oils	9.35
13 Paints and Oils	52.66
14 Engine Supplies	37.63
15 Equipment	
16 Repairs of Engines	813.87
17 Repairs of Boilers	25.90
18 Repairs and Renewals of Tools	45.15
19 Miscellaneous	28.27
20	
Total	2,738.30

STEWARD'S DEPARTMENT

21 Stores	257.22
22 Wages of Stewards, Cooks and Waiters...	142.50
23 Rep's & Ren's of Tableware, Linen & Galley Utensils	
24 Board Money paid Crew	
25 Miscellaneous	11.93
26	
Total	411.65

MISCELLANEOUS

27 Wages of Captain, Officers and Seamen...	559.35
28 Wages of Purser and Clerks.....	
29 Stevedoring	305.89
30 Dockage, Lighterage, Switching and Drayage	49.70
31 Dues, Tolls and Custom House Charges...	
32 Towage and Pilotage	
33 Damage to other Vessels and Docks.....	
34 Loss and Damage Claims.....	
35 Insurance on Cargo	
36 Insurance on Vessel	812.40
37 Other Expenses	50.92
38 Commissions	54.93
Total	1,833.19

Total Operating Expenses.....5,289.03

Net Earnings2,736.43

November 15, 1906

Cargo: Coal and Mdse.

OUTWARD

Sailed	From
Sept 1, 1906.	Seattle.
Arrived	At
Sept. 5, 1906.	San Francisco.
Sailed	From

Arrived At

Cargo: Ore.

INWARD

Sailed	From
Sept. 15, 1906.	San Francisco.
Arrived	At
Sept. 19, 1906.	Everett.

Sailed	From
Sept. 20, 1906.	Everett.
Arrived	At
Sept. 20, 1906.	Tacoma.
Arrived at Seattle, Sept. 22, 1906.	

RECORD OF VOYAGE

Days	In Port 14½ days.
	At Sea 9½ "
	Total 24 "

Knots Run 1,725

Cost of Fuel per Knot .477

	In Port	At Sea
Docked at Moran's, Seattle	1	
Loading at Seattle.	1	
Seattle to San Fran.		5
Disch'g. and loading at San Francisco.	10	
San Fran to Everett.		4
Disch'g. at Everett & Tacoma	2½	
Movements on Sound.		½
	14½	9½

[On reverse side:]

GLOBE NAVIGATION CO.
Limited

STATEMENT OF EARNINGS AND OPERATING EXPENSES

S. S. Meteor

Voyage 51

NEAL H. BEGLEY,

Auditor.

GLOBE NAVIGATION CO., LTD.

VOYAGE EARNINGS AND EXPENSES

S. S. METEOR

Voyage 52

Dec. 12, 1906

GROSS EARNINGS.

No. Bound. So. Bound. Total.

Cargo: Coal.

Coal, 3325 1415/2240 @			
1.50	4,988.45	4,988.45	
Ore, 1482 tons 1.50.....	2,223.00		
" 1048 " 1.75.....	1,834.00	4,057.00	
Demurrage		1,032.60	

Total Gross Earnings...4,057.00 4,988.45 10,078.05

OPERATING EXPENSES.

MAINTENANCE OF HULLS AND CABINS:

1 Repairs of Hulls and Decks	608.23
2 Repairs of Equipment	
3 Repairs of Winches and Hoisting Apparatus	2.90
4 Repairs of Furniture, Draperies and Linen.	.80
5 Repairs of Sails and Rigging.....	1.34
6 Paints, Oils and Maintenance Supplies..	23.45
7 Miscellaneous	1.25
8	
Total	637.97

ENGINEER'S DEPARTMENT

9 Wages of Engineers, Firemen and Helpers.	770.95
Fuel, (10) cost \$849.48 (11) Labor \$12.15..	861.63
12 Lubricating Oils	7.00
13 Paints and Oils	
14 Engine Supplies	52.04
15 Equipment	19.25
16 Repairs of Engines	30.27
17 Repairs of Boilers	
18 Repairs and Renewals of Tools.....	3.81
19 Miscellaneous	25.20
20	
Total	1,770.15

STEWARD'S DEPARTMENT

21 Stores	337.44
22 Wages of Stewards, Cooks and Waiters...	176.50
23 Rep's & Ren's of Tableware, Linen & Gal- ley Utensils	2.35
24 Board Money paid Crew	36.65
25 Miscellaneous	8.94
26	
Total	561.88

MISCELLANEOUS

27 Wages of Captain, Officers and Seamen..	632.80
28 Wages of Pursers and Clerks.....	
29 Stevedoring	482.21
30 Dockage, Lighterage, Switching and Dray- age	42.60
31 Dues, Tolls and Custom House Charges....	
32 Towage and Pilotage	15.00
33 Damage to other Vessels and Docks.....	
34 Loss and Damage Claims.....	9.16
35 Insurance on Cargo	
36 Insurance on Vessel	981.65
37 Other Expenses	92.44
38 Commissions	71.39

Total2,327.25

Total Operating Expenses5,297.25

Net Earnings4,780.80

OUTWARD

Sailed	From
Sept. 28, 1906.	Seattle.
Arrived	At
Oct. 2, 1906.	San Francisco.
Sailed	From
Arrived	At

Cargo: Ore.

INWARD

Sailed	From
Oct. 13, 1906.	San Francisco.
Arrived	At
Oct. 18, 1906.	Tacoma.
Arrived	At
Oct. 20, 1906.	Everett.
Arrived	At
Oct. 22, 1906.	Seattle.

RECORD OF VOYAGE

Days {	In Port 20½
	At Sea 8½
	Total 29

Knots Run 1,704

Cost of Fuel per Knot .373	In	At
	Port	Sea
Loading at Seattle.	5	
Seattle to San Fran.		4
Discharging and load- ing at San Fran.	12	
San Fran. to Tacoma.		4
Discharging at Ta- coma and Everett.	3½	
Movements on Sound.		½
	20½	8½

[On reverse side:]

GLOBE NAVIGATION CO.

Limited

STATEMENT OF EARNINGS AND OPERATING EXPENSES

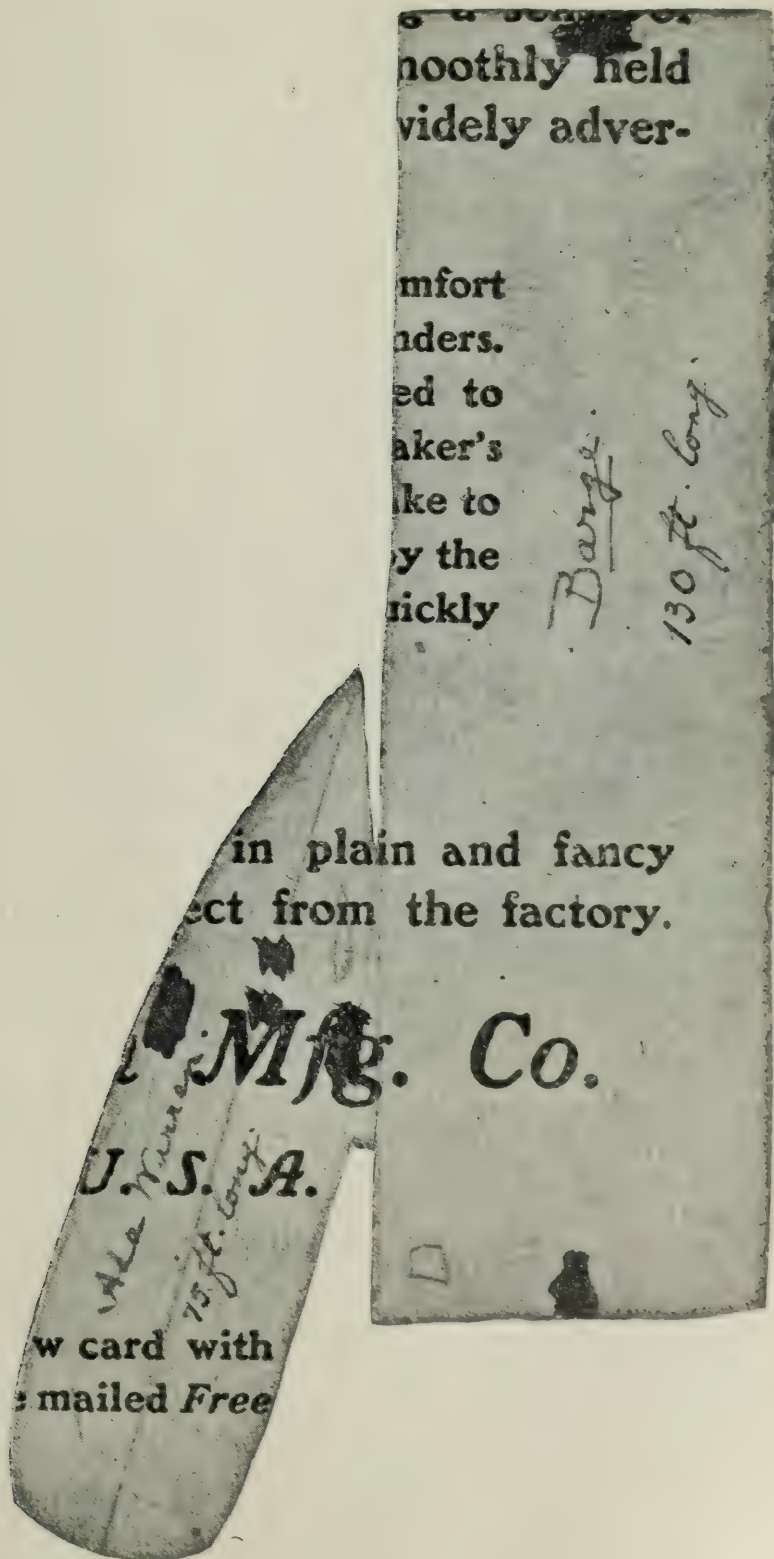
S. S. Meteor

Voyage 52

NEAL H. BEGLEY,

Auditor.

[Libelant's Exhibit "A" (No. 13,602 and 13,642).]



[Endorsed]: No. 13,602-13,642. Globe Nav. Co. vs. Tug "Ada Warren." Warren Imp. Co. vs. Am. S.S. "Meteor." Lib. (13,462) Exhibit "A." Jas. P. Brown, Clerk. By Francis Krull, D. C.

No. 2267. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelant's Exhibit (13,462) "A." Received Apr. 15, 1913. F. D. Monekton, Clerk.

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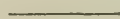
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No. 2267

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANIEL E. MORRIS et al.,

Appellants,

VS.

THE GLOBE NAVIGATION COMPANY,

Appellee.

APPELLANTS' OPENING BRIEF.

PART I.

Liability for the Collision.

I. Statement of the Case.

This is a case of collision, on the morning of October 11, 1906, shortly after 4 A. M., between the steamship "Meteor" (253.6 ft. long) and the tug "Ada Warren" (75 ft. long), towing a heavily loaded barge (130 feet long) lashed to her starboard side. The "Meteor" was coming down the Straits of Carquinez from Port Costa, and the tug with her tow was entering the Straits from San Pablo Bay, bound for Suisun Bay.

The story of the master of the "Meteor" is substantially as follows:

The night was clear, the tide was flood, and there was very little wind (p. 83). When about three miles off, the master picked up, with the glass, two mast-head lights and the green light of the tug, about $11\frac{1}{2}$ points on his port bow (p. 84). He knew that the lights were a tug, with a tow (p. 102). This was 10 minutes before the collision which ensued. For 5 minutes before the collision, he knew that the lights indicated a tug with a tow by her side (p. 102). The green light was proceeding across the straits, but he could not tell, whether the tug and tow were going directly across the straits, "or coming at an angle" (p. 84). He thought, however, that she was making for South Vallejo (pp. 85, 95). The "Meteor" kept her course and speed, 8 knots, full speed, until the two vessels were about a thousand feet apart (p. 85). The tug and tow had actually started to cross the bow of the "Meteor"—"only partly; enough to show the green light on my starboard bow * * * possibly a quarter of a point" (p. 97).

We have now arrived at the critical moment. The captain of the "Meteor" is fully alive to the situation; he knows that a tug, with a tow, is crossing his bow, and expects that the two vessels will pass each other in safety. In answer to questions of his counsel he answers:

“Q. Captain, suppose the ‘Ada Warren’ had continued on her course, without changing it, after she had crossed your bow, would you have cleared her on the course you were then sailing?”

A. Yes, I think we would.

Q. How would you have cleared her, astern or how?

A. *We would have gone astern of the scow.*

Q. What, then, would you say was the cause of the collision?

A. *I think, if he had never blown the one whistle and proceeded on the same course she was on, that we would have avoided a collision”* (p. 92).

Again:

“Q. Then, as I understand your testimony, you mean to say that, as you saw these two in the stream, they appeared, as far as you could see in the dark, as one body, *and you could have passed that body, whatever it was, if it had continued on its course?*

A. Yes, sir” (p. 93).

The libel alleges:

“if said tug continued on said course she and her tow would have safely passed the bow of said steamship ‘Meteor’ ” (p. 11).

In the critical moment, therefore, all would have been well had the “Ada Warren”, with her heavy tow, continued her course.

The theory of the “Meteor” is that the “Ada Warren” is to blame for the collision, because, in the critical moment, she *changed her course*. The testimony of the master of the “Meteor” showed

that, in the critical moment, the “Ada Warren” immediately showed *both red and green* lights and *blew one whistle*. In other words that, after being on the point of passing the “Meteor” in safety, she suddenly and unexpectedly swung back into the path of the oncoming steamer, head on.

In view of the fact that appellant was unable to produce, at the hearing, an eye-witness of the collision, and was dependent upon the testimony of the “Meteor’s” master, we found it impossible to account for the alleged eccentric navigation of the little tug, impeded as she was by the heavy and cumbersome barge by her side. Her return to the path of destruction, from the safe course she was pursuing, seemed mysterious and, indeed, an attempt at deliberate suicide. The testimony of the master of the “Meteor” seemed to us so inherently improbable that we asked the Court to reject it in this particular. The Court did not feel justified in doing so, and we appreciate that a finding based upon the evidence then produced before the Court is ordinarily binding upon us.

New Evidence.—The apparent mystery has now, however, been cleared up by new evidence introduced into the record by the Globe Navigation Company, in “Libelant’s Exhibit A” (p. 231), containing an affidavit in the nature of a marine protest, made by the master of the “Meteor”, and sworn to by him on October 12, 1906, the DAY AFTER THE COLLISION, when the facts of the collision were

fresh in his mind. It may be presumed that the facts of the collision were more correctly reported by this interested witness immediately after the occurrence than they were after the lapse of four months, a period amply sufficient for the incubation of theories (his deposition was taken by libellant on February 6, 1907).

It appears from this affidavit of the master of the "Meteor" that he gave "*a short blast*" BEFORE the "Ada Warren" changed her course and blew one whistle. The master attempts to explain away the short blast by saying that he "*started* to put his helm to starboard to *change his course to port* * * * and had *started* to blow his whistle to give notice to that effect" (p. 231) (such notice being *two* blasts); but, apart from his intentions, upon which the "Ada Warren" could not act, the *fact* remains that he blew one short blast of his whistle in the critical moment.

And *then*, as was to be expected, the "Ada Warren" immediately showed both red and green lights and blew one whistle. Her course must have been practically end on to the "Meteor", rather than a crossing course; her red light was barely shut out.

"Q. (by Mr. Denman). Did the green light of the 'Warren' at any time cross your bows?

A. Yes, sir.

Q. At about what distance from you?

A. About a thousand feet.

* * * * *

Q. What happened after the 'Warren' crossed your bows?

A. She immediately showed both red and green lights and blew one whistle" (p. 85).

After the "Ada Warren" showed both lights and blew one whistle, the "Meteor" again blew one whistle, and her helm was at once put hard aport (p. 86). Then she immediately blew three whistles, indicating that she was backing full speed (p. 99). She was backing "two minutes by the bridge clock; by the engineroom clock, the engineer reported three minutes" (p. 108). The master testifies that his steamer "was practically stopped" at the time of the collision (p. 106); that the effect of throwing the wheel hard over and backing at the same time full speed was to throw the "Meteor's" nose to starboard, and her stern to port (p. 106); and that "at the time of collision we were practically heading right across the channel" (p. 88).

II. Specification of Errors Relied Upon, and Statement of the Particulars in Which the New Evidence Introduced by Appellee Has Changed the Case.

The present appeal is prosecuted upon an assignment of errors set forth at pages 200-205 of the apostles considered in the light of the new evidence introduced into the case by appellee, in the "Affidavit of Master" (pp. 231-232), which recites the occurrences of the collision under date of October 12, 1906, the day after the collision.

By this evidence a new fact is injected into the case, viz., the fact that *the master of the "Meteor" blew one whistle before any signal was given by the "Ada Warren."*

This fact changes the whole aspect of the case.

If it had been possible to show this fact to the Court below, the findings and decree would, we believe, have been different. The distinguished judge who wrote the opinion would have formed a different theory upon the evidence as so presented, and, we are warranted in believing, would have come to the opposite conclusion on the question of fault. This witness, T. D. McFarland, did not appear at the hearing, and the trial judge had no opportunity of receiving an impression of him except through his statements in the deposition. We had no means of knowing of, nor of producing, this evidence which the Globe Navigation Company has introduced into the record. We contend that this new evidence changes the case as made in the Court below in two respects:

First. It enables this Court, by adding the new fact shown in the affidavit to the facts shown in the master's deposition, to arrive at a different conclusion and decision from that of the Court below, on the ground that the case is now a new case.

Second. It justifies this Court, on the ground of flagrant suppression of the truth, as evidenced

by the master's deposition, in rejecting the whole deposition of the master.

We believe that this Court, by following either method in this trial de novo, will agree with us that appellee has no case against appellant.

III. Brief of the Argument.

A. IF CREDENCE IS GIVEN TO THE FACTS STATED IN BOTH AFFIDAVIT AND DEPOSITION, THE "METEOR" WAS SOLELY RESPONSIBLE FOR THE COLLISION.

1. *The facts as they appear in the Master's Affidavit.*

The sequence of events, as stated under oath immediately after the collision, is (p. 231):

1st. The master of the "Meteor" saw the green light of "Ada Warren" off his port bow, 11½ miles distant. Held his course.

2nd. The master of the "Meteor", seeing that there was danger of collision, "started to put his helm to starboard and had started to blow his whistle to give notice to that effect."—"At this time of changing his course when he started to give two blasts of his whistle, the deponent HAD ALREADY PULLED THE WHISTLE CORD AND A SHORT BLAST HAD BEEN GIVEN before the change of course of the 'Ada Warren' was noticed."

3rd. Suddenly the "Ada Warren" "blew one whistle and changed her course, showing a red light".

4th. At once the "Meteor" ordered her engines full speed astern and gave three short blasts.

5th. About two minutes afterwards, the "Meteor" having practically lost her headway, the "Ada Warren" struck the "Meteor" on her port bow.

Assuming this statement to state the whole truth, it follows fairly from it that the collision was due solely to the fault of the "Meteor" in giving one blast and thereby giving notice that she was directing her course to starboard, when, as a matter of fact, she was doing an entirely different thing. The very worst thing that she could have done was to invite the "Ada Warren" to turn to starboard and, at the same time, stop and reverse and throw herself across the course which she had invited the "Ada Warren" to take. It could not be claimed that this wrong signal and wrong maneuver were made in extremis, in the light of the master's positive testimony that the interval between the collision and the moment when he started to back was two, or three minutes, *by the clock* (p. 108). Adding thereto the interval between the moment when he gave his short blast, and the moment when he started to back, he had *more than three minutes by the engineroom clock* within which to pass the "Ada Warren", port to port. Instead of spending these three or more precious minutes in the maneuver which he signalled, and which the "Ada Warren" promptly assented to, and which would have prevented the collision, the master of the "Meteor" threw his vessel across the path of the "Ada Warren".

2. *The facts as they appear in the Master's Deposition.*

To make a case for libelant in Court, it was necessary to adopt a better theory than any that could have been constructed upon the master's affidavit, sworn to the day after the collision. To establish a better theory, it was necessary to revise the facts and to drop out of the *mise-en-scène* the little fact that the master of the "Meteor" had given the first signal of one short blast. In the time which intervened between October 12, 1906, and February 6, 1907, this feat was successfully accomplished. This is his testimony in the deposition, taken at the latter date, on cross-examination:

"Q. Captain, did you blow any whistle from the 'Meteor' before the one whistle signal came from the 'Warren'?"

A. No, sir" (p. 97).

Again:

"Q. What was the first order you gave on your steamer, captain?"

A. The first order?

Q. Yes.

A. Hard aport.

Q. When did you give that order?

A. The minute I heard the one whistle on the tug.

Q. You did not give any other order before that, did you?

A. No, sir.

Q. To whom did you give that order, captain?

A. The quartermaster.

Q. Where was he?

A. Standing alongside of me at the wheel.

Q. *You are positive you never gave him any other order before this one, are you?*

A. *Yes, sir*'' (pp. 98, 99).

Again:

“MR. DENMAN. Q. Captain, you have heretofore testified that the quartermaster was not given any order to put the helm to port prior to the time that the one whistle was blown from the ‘Warren’. Did you at any time prior to the blowing of that whistle start to give such order?

A. *To port, no, sir*'' (p. 111).

All this is in direct conflict with his sworn statement in the affidavit, previously made, that he blew the first signal, one short blast.

The whole trend and theory of his deposition is that the “Ada Warren” blew the first signal, and that *the cause of the collision was that the “Ada Warren” blew this one whistle instead of proceeding on the course she was on.*

The libel alleges:

“If said tug had continued on said course (northeasterly), she and her tow would have safely passed the bows of said steamship ‘Meteor’.”

At the deposition of the captain of the “Meteor”, the following occurred, in answer to questions by Mr. Denman:

“Q. Captain, suppose the ‘Ada Warren’ had continued on her course, without changing it, after she had crossed your bow, would you

have cleared her on the course you were then sailing?

A. Yes, I think we would.

Q. How would you have cleared her, astern or how?

A. We would have gone astern of the scow.

Q. What, then, would you say was the cause of the collision? * * *

A. I think if he had never blown the one whistle and proceeded on the same course she was on, that we would have avoided a collision" (p. 92).

* * * * *

"Q. Then, as I understand your testimony, you mean to say that as you saw these two in the stream, they appeared, as far as you could see in the dark, as one body, and you would have passed that body, whatever it was, if it had continued on its course?

A. Yes, sir" (p. 93).

If the "Ada Warren" blew one whistle *before* the "Meteor" had given a signal (theory of the *deposition*), then it could be plausibly claimed that the fault for the collision lay with the "Ada Warren"; but if the "Ada Warren's" one whistle was in answer to the "Meteor's" one whistle, followed by the "Warren's" compliance with the invitation tendered by the "Meteor's" whistle (as the *affidavit* shows), then the cause of the collision was the act of the "Meteor" in blowing one blast, combined with her failure to follow it up by the corresponding action.

Of course, it would have seriously embarrassed the theory of the deposition, if the fact of the

“Meteor’s” first one-blast had made its appearance in the trial of this case. But “murder will out.”

The remarkable and, at the time, inscrutable attempt or “desire to bring out that there were orders which it was desirable to give, but which were not actually given, if such be the fact” (p. 110), can now be understood as an explanation, in advance, of the appearance of the troublesome fact, if ever it should be indiscreet enough to come forth into the light of day. Why should libelant have a desire to bring out that there were orders which it was desirable to give, but which its master did *not* actually give? How could orders which the master did not give, but which it was desirable to give, possibly have any value in libelant’s case. Those were the questions which we were permitted “to wonder on, till truth make all things plain.”

The questions addressed to the witness at the deposition, with great persistence (pp. 109-111), appear now to have had this purpose: To show that the one-blast signal given was excusable, because it was really not a one-blast signal at all, but a two-blast signal in disguise; that the master “*started*” a two-blast signal, but only got far enough to give one blast; and that the one-blast signal which he actually did give, and which caused the mischief, was excusable, or even laudable (“desirable”), on the ground that it was, in its deeper significance, not a one-blast signal, but an *intended or inchoate two-blast signal*.

After the witness had definitely declined his counsel's invitation to testify that he started to give an order to put the helm to *port* (p. 111), the following examination took place between him and Mr. Denman:

“Q. Now, captain, did you at any time, about the time when you put your hand to the whistle cord, prior to the whistle that was blown on the ‘Warren’, start to give an order to the quartermaster to put the wheel to *starboard*?

A. I took hold of the whistle cord with the intention of blowing him two whistles to go to starboard. I hadn't given the order.

Q. That is the best of your recollection, that you had not given the order?

A. Yes.

Q. But you did not do it?

A. No, sir.

Q. And before you had time to do it, the whistle came from the ‘Warren’?

A. Yes, sir.

Q. Was the quartermaster awaiting that order?

Mr. HENGSTLER. In other words, the quartermaster was a mind reader” (p. 111)?

We submit that this attempted differentiation between, on the one hand, a real one-blast signal, and, on the other hand, a one-blast signal which was an intended two-blast signal, cannot help libellant. A one-blast signal *in esse* cannot be converted into a two-blast signal *in posse*. What would be the predicament of the poor mariner at sea, who, on receiving a one-blast signal from an approaching vessel, had no right to act upon it until he had

first ascertained, by some process of mind reading, whether it was a genuine one-blast signal—or perchance a “started” two-blast signal?

3. *The “Meteor” story as it appears from both Affidavit and Deposition.*

If credence be given to the facts sworn to by Captain McFarland both in his affidavit and his deposition, it follows that, in the moment when, according to the testimony of the “Meteor”, the vessels would have passed each other in safety (pp. 92, 93), had they both continued in their course, the “Meteor” gave one short blast of her whistle and thereby *first*, said: I am going to starboard!, and *second*, invited the “Ada Warren” to turn to starboard. The “Ada Warren” turned to starboard as directed; the “Meteor”, on the other hand, did not act in accordance with her announced intention, but laid herself across the channel and across the “Warren’s” path. This is what caused the collision.

B. IF ALL THE EVIDENCE ON BOTH SIDES IS CONSIDERED, IT FOLLOWS THAT THE “METEOR” WAS RESPONSIBLE FOR THE COLLISION.

This is the story of the collision if we give full credit to the testimony regarding *positive facts* sworn to by the master on the two occasions when he was under oath, merely disregarding his denial, at the deposition, of the embarrassing fact which

he disclosed in his affidavit directly after the accident. All the evidence, on both sides, tends, however, to show that the "Ada Warren" never crossed the bow of the "Meteor". (Indeed, the latter's captain only claims that she crossed her bow "only partly; only enough to show the green light on my starboard bow * * * just a short ways * * * it was not—possibly a quarter of a point" (pp. 96, 97). If that be so, she had barely started to cross). In reality, the combination of tug and tow was practically *coming end on* to the "Meteor", and this was possible even on the assumption that the "Meteor" did not see the "Warren's" red light. If they met end on, the one-blast signal first given by the "Meteor", and promptly answered by the "Warren", was the proper signal, and the turning of each to starboard was the proper and only maneuver. Therefore, the "Ada Warren" executed the proper maneuver, while the "Meteor" did not.

(1) *The vessels practically met end on, before the collision.*

Libelant's witness, Dick Miller, testifies that he watched "the big steamer" ("Meteor") from a point in the middle of the "Ada Warren's" barge, on some boxes, looking right ahead (p. 69); that the "Meteor" was "about in the middle of the channel", coming down the straits (p. 74). This witness qualified as a sailor, "sailing about 25 years in deep waters", then "about 10 years here on this coast" (p. 66). He testifies:

“That is all I noticed, one whistle that they blew. *I came down again, and think everything was all right*, and I took a tumble to myself that there might be a mistake, and I went outside the boxes on the barge on the starboard side, and I looked to see where the steamer was * * * ” (p. 69).

It is true that he says that the “Meteor” “was about half a point on the starboard bow” (p. 69), but we respectfully submit that this estimate should not be taken literally, being, in the very nature of such estimates, unreliable; and for the more potent reason that he, as a sailor of such extensive experience, could not possibly have thought that “everything was all right” and come down from his lookout, after he had heard the “one whistle that they blew”, unless he was satisfied that the two vessels were meeting end on and not in a position where his vessel was crossing the bow of the “Meteor”. This feeling of security, and his coming down from his position after having seen the approaching steamer, thinking everything was all right, are facts inconsistent with any danger that existed at the time when he made his observation from his lookout. These facts are also inconsistent with the estimate or opinion that the “Meteor” was slightly on his starboard bow, and when *facts* conflict with opinions or estimates, the latter must fall. These facts are consistent only with his being satisfied that the two vessels, after the “one whistle that they blew”, were meeting *practically end on*.

That the vessels met practically end on, follows also fairly from all the testimony in the case, including the deposition of the master of the "Meteor". When the "Ada Warren" was first seen by the "Meteor", she was coming from San Pablo Bay and bound for Carquinez Straits. As the vessels drew nearer, the "Warren" was swinging into the straits around the Selby turn, to go up to Suisun Bay, while the "Meteor" was coming down to San Pablo Bay. It is undisputed that their *real* courses and destinations were in opposite directions. They met in the straits while pursuing opposite courses. There is an inherent improbability that the "Ada Warren" intended to pass the "Meteor" on the latter's starboard side; to assume such an intention would be to assume either that the "Ada Warren" was on the wrong side of the channel in going up, or the "Meteor" on the wrong side coming down. If, as the testimony even of the "Meteor" seems to indicate, the latter was about amid-channel, it is natural to assume that the course of the "Ada Warren" lay either along the port side of the "Meteor", or at most head on to the "Meteor". The testimony of Captain Hammer of the "Warren", that the line A. B. (see map) is the usual course which the "Warren" would take on her voyage to Suisun Bay (p. 34) is uncontradicted.

"Take these river steamers, they come right up along the wharves, close in—skim the wharves, you call it; they keep pretty close in" (meaning close

to the Contra Costa shore) (p. 39). The Contra Costa shore is "lit up all along the shore", whereas "the Solano shore would be black * * * totally dark, until you got up to Benicia" (p. 39). Selby's wharf, on the Contra Costa shore, is "an easy point to pick up" (p. 39). All these are reasons why the natural course of the "Warren" was along or close to the line A. B.

The captain of the "Meteor" says that he "couldn't tell, the way the lights were shining, whether he (the 'Ada Warren') was going right straight across the straits or coming at an angle" (p. 84); that his *opinion* was that the "Ada Warren" was "making for South Vallejo" (p. 85).

"Q. Could not tell what direction the lights were coming from?

A. No, sir—I could tell the direction, but *I couldn't tell what angle she was coming on*" (p. 97).

In other words, he could not tell whether the vessels were proceeding on crossing courses; his *impression* was that she was going across the channel to South Vallejo (p. 95). It was a mistaken impression, for she was going up the channel to Suisun Bay. The "Meteor's" navigation, under the deposition theory, was based upon a mistaken assumption of facts. All the presumptions and facts of the case show that the vessels were not crossing vessels, but vessels meeting end on, or practically so.

This conclusion is not necessarily in conflict with the testimony of the captain of the "Meteor" that

he saw the "Ada Warren's" green light "just a short ways" on his starboard bow—"possibly a quarter of a point." It is possible that the green light of the tug was seen from the "Meteor" just on the latter's starboard side, although the *combination of tug and tow* was approaching practically head and head. If the center line of the "Meteor" be continued in the direction from stern to bow, and the approaching combination be placed so that the green light of the tug is just across the continued line, viz., the course of the "Meteor", to her starboard, a large part of the heavily laden barge may still be on the other side of the continued line, viz., on the "Meteor's" port side, and if the combination continues to come on in this direction, it is really coming end on to the "Meteor's" bow. Dick Miller testified that he saw the "Meteor" about $\frac{1}{2}$ point from the starboard bow of the barge (p. 69). What *appeared* $\frac{1}{2}$ point of the starboard bow of the *barge* was in fact practically end on to the *combination* of tug and barge. The "Meteor's" captain was charged with knowledge of, and did know, the fact that a tow was lashed to the side of the tug (pp. 102 and 103), and he had no right to act upon the mistaken *impression* that the tug and tow were crossing the channel. The fact that the green light was, at first, $1\frac{1}{2}$ points on his port bow, and gradually moved nearer to the bow, is naturally explained by the fact that the "Ada Warren" was coming from the channel of San Pablo Bay into Carquinez Straits, and was,

therefore, describing a curve which changed from a northeasterly direction (p. 11) to an easterly direction, while the "Meteor" was proceeding on a westerly course...

In other words, after the "Warren" had swung into the straits, the vessels were meeting end on. The "Meteor" had no right to assume that the vessels were on crossing courses, and to navigate on such assumption. The fact that her captain "couldn't tell what angle she was coming on", could not tell what direction the lights were coming from (p. 97) is quite consistent with the assumption that, in fact, the vessels were practically "head and head" toward each other. Under the latter assumption it was the duty of the "Meteor" to give one blast of her whistle—*which she did*—to put her helm to port—*which she did*—and to pass to the right—*which she did NOT do*. This failure to pass caused the collision. Instead of passing, she gave three whistles, backed full speed, "heading right across the channel" (p. 88), through which the "Ada Warren" was coming on. "The big steamer changed his course and went across us" (Dick Miller, p. 70). "The big steamer changed and came across" (p. 71).

**C. THE DEPOSITION OF THE MASTER OF THE "METEOR"
SHOULD BE REJECTED IN TOTO.**

1. *The Affidavit.* The five successive stages, as stated in the master's affidavit, are the following:

1st. "Meteor" sees green light of "Warren" off his port bow, $1\frac{1}{2}$ miles distant. Both vessels hold their course.

2nd. Seeing that there was danger of collision, "*Meteor*" blows one blast.

3rd. "Warren" blows one whistle and changes her course to starboard, showing red light.

4th. "Meteor" blows three blasts and goes full speed astern.

5th. About two minutes later: Collision.

2. *The Libel.* The successive stages, as described in the Globe Navigation Company's LIBEL (applying corresponding numbers to corresponding events), are the following:

1st. "Meteor" sees green light of "Warren" off port bow, "Meteor" proceeding westerly, "Warren" northeasterly (pp. 10-11). Both vessels hold their course.

2nd. As to the "Meteor" blowing one blast—*silence.*

3rd. When.....thousand feet apart, "Warren" turns to starboard, showing both lights, head on to "Meteor" (p. 11).

4th. "Meteor" goes to starboard, and starts full speed astern, giving three whistles (p. 12).

5th. Collision.

The theory of the libel is set forth, in Article IV, as follows:

“ * * * if said tug had continued on said course, she and her tow would have safely passed the bows of said steamship ‘Meteor’.”

It will be noted that, except as to the “Meteor’s” three-blast signals, the last before the collision, the libel is silent on the subject of *signals*.

3. *The Deposition.* The successive stages, as stated in the master’s *deposition*, are the following (still retaining corresponding numbers as to corresponding events):

1st. “Meteor” sees green light of “Warren”, 1½ points off port bow, 3 miles distant (p. 84). Both vessels hold their course (p. 85).

2nd. As to the “Meteor” blowing one blast: Positive testimony that “Meteor” did not blow one blast:

“Q. Did you blow any whistle from the “Meteor” before the one whistle signal came from the “Warren”?

A. No, sir” (this on cross-examination, p. 97).

Again:

“Q. What was the first order you gave on your steamer, captain?

A. The first order?

Q. Yes.

A. Hard aport.

Q. When did you give that order?

A. The minute I heard the one whistle on the tug.

Q. You did not give any order before that did you?

A. No, sir” (on cross-examination, p. 98).

Again, on page 111, in answer to questions by his counsel, he testifies that, prior to the blowing of the "Warren's" whistle, he did *not even start* to give the order to port the helm (corresponding to the one-whistle signal); but:

"A. I took hold of the whistle cord with the intention of blowing him two whistles to go to starboard. I hadn't given the order.

Q. That is the best of your recollection, that you had not given the order?

A. Yes.

Q. But you did not do it?

A. No, sir.

Q. And before you had time to do it, the whistle came from the "Warren"?

A. Yes, sir" (answers to questions by his counsel, p. 111).

3rd. Corresponds with affidavit.

4th. Corresponds with affidavit.

5th. Collision, after "Meteor's" backing "two minutes by the bridge clock; by the engine clock, the engineer reported three minutes" (p. 108).

It will be noted that, on October 12, 1906, the captain swore that the first signal given by either vessel was the one short blast blown by the "Meteor"; on October 17, 1906, the libel is *silent* on this subject; on February 6, 1907, the captain swore that the first signal given by either vessel was the "Warren's" one blast when she was about to cross the "meteor's" bow. He swore emphatically and repeatedly both, that he did *not* blow any whistle before he heard the "Warren's" whistle; and also

that the first order which he gave was given *after* he heard the "Warren's" whistle.

The deposition is in flagrant conflict with this witness's affidavit in which he swears, *immediately after the collision*, that he "had already pulled the whistle cord and a short blast had been given *before* the change of course of the 'Ada Warren' was noticed" (p. 232).

It is clear that this fact, once affirmed and once denied under oath by the same witness, is a cardinal fact in this case. If the "Meteor" did blow the one whistle and thereby directed the tug and tow to turn to starboard, at a time when they would otherwise have safely passed, then the fault for the collision lies clearly with the "Meteor".

Both of this witness's sworn statements cannot be true. If the Court is to choose between them, it should adopt the version of the affidavit and reject the version of the deposition, for two reasons:

First. Because the testimony of the affidavit was taken immediately after the accident, whereas the deposition was taken nearly four months later.

"When collisions at sea take place open to the view of all parties, and become afterwards subjects of litigation, courts look carefully at the first version given of the transaction by the parties concerned, and distrust all additions to, or abstractions from, the original representation, particularly when made under oath." (Judge Betts in *Wells. v. The Anne Caroline*, 29 F. C. 17, 389a.)

In *The North Star*, 43 Fed. 807, 813, the witnesses produced by one vessel in a collision case swore that they did not hear a certain signal from the other vessel; but the protest indicated that this signal *was* heard by the first vessel. The Court found that the first vessel *did* hear the signal, Judge Brown saying in this connection:

“These protests are, I think, very cogent evidence. They are made when the memory of the witnesses is fresh, and nothing is present in their minds but the facts of the collision. They are unadulterated by legal advice, and are made at a time when no temptation to deviate from the letter of truth has presented itself to them.”

In *The George Shiras*, 61 Fed. 300, 307 (C. C. A. 3d Circ.), the Court said:

“It is very significant that the revised explanations of the accident are given fully two years after it occurred. The damaging admissions were made on the very day it happened, when all the incidents were fresh, and the causes which operated to produce it would have been perfectly well known and understood.”

Statements made by any witness, when the facts must have been fresh in his mind, will discredit his subsequent testimony to the contrary.

Moore on Facts, Sec. 752, Sec. 757.

Second. Because the declarations of the master of a vessel, which relate to his conduct at the time of the disaster, and are inconsistent with his testimony, constitute strong impeaching evidence.

In *The Sea Breeze*, 21 F. C. No. 12,572a, declarations of the master, made at various times, and inconsistent with his testimony, were shown. The Court said:

“The Court is well aware that, in admiralty causes, the admissions of the crews of the respective vessels are not of the most satisfactory and reliable nature; but, in the present instance, they are shown to have been made by an intelligent shipmaster, who was also a part owner of his vessel; and they relate to his own conduct at the time of the disaster,”

and the Court used these conflicting admissions to impeach his testimony.

In *The Jean Bart*, 197 Fed. 1002 (N. D. Cal.), the master and mate of the vessel, in their depositions, wilfully perverted the truth. Judge Dietrich, on that ground, refused to give credence to their testimony on several other vital issues in the case.

The case at bar is as serious a case of perversion of truth as is the case of the “Jean Bart”, and equally adapted for the application of the principle: “*Falsus in uno, falsus in omnibus.*”

The intentional suppression by a witness of facts pertinent to the case is regarded in the same light as the false statement of facts of like bearing. Had the master of the “Meteor” simply passively dropped the vital fact of the one-blast signal given by him out of his story, this would be sufficiently serious to impeach his whole testimony; but the case at bar is aggravated by the fact that the

captain positively, and under oath, denies a fact which he previously had positively, and under oath, declared to be a fact.

“The cardinal rule, which has served in all ages, and been applied to all conditions of men, is that a witness wilfully falsifying the truth in one particular, when upon oath, ought never to be believed upon the strength of his own testimony, whatever he may assert.” (Judge Betts in *U. S. v. Osgood*, 27 F. C. No. 15,971a.)

In the case of *Schultz v. Pacific Ins. Co.*, 14 Florida 73, two of the witnesses for the defendant swore at the trial to a fact showing that a ship was unseaworthy when she left port. Previously these witnesses “when all of the facts connected with this matter must have been fresh in their minds, joined in the protest of the captain and then swore * * * that when they left Pensacola the bark was tight, staunch and strong”. The appellate Court said:

“It would certainly be improper * * * to set aside a verdict of a jury by giving credence to anything sworn to by persons thus plainly guilty of false swearing. What they swear to in this protest, and what they swear to in this trial, is entirely inconsistent, and for this reason the jury was entirely justified in giving no weight to their testimony in any particular.”

It could not be seriously denied that the question, which one of the vessels gave the first signal, was a material and vital question in this case. It is the cardinal issue.

We are justified in asking the Court to reject the entire testimony of Captain McFarland of the "Meteor", on the ground that he testified in direct contradiction of statements made by him in the affidavit of October 12, 1906, on the vital issue in this collision. The whole case of the libelant rests upon the testimony of this one witness.

D. EVEN ON THE HYPOTHESIS THAT THE FACTS, AS THEY APPEAR FROM THE MASTER'S DEPOSITION, (APART FROM HIS SURMISES AND THEORIES) PRESENT THE WHOLE TRUTH, THE "METEOR" WAS AT FAULT.

1. *The master was not competent to navigate in the difficult waters in which the collision occurred.*

He had no licensed pilot on board, nor himself any pilot's license for these waters, and admits that he navigated his vessel, although he knew that it was unlawful to navigate those waters without a licensed bay pilot (p. 94).

He was entirely unfamiliar with these waters. He apparently described, to his counsel, the place where the collision occurred by saying that it happened "while he was proceeding down the Bay of San Francisco in a westerly direction from Port Costa" (libel, II; p. 10). No navigator with the most superficial knowledge of these waters would describe them as the Bay of San Francisco. Again, when asked by his counsel about the location of Port Costa, he says:

“Q. And which side of those straits?

A. On the right hand side going up.

Q. What is that by the compass * * *
the general direction?

A. On the east side—west side.

Q. On the east side or west side?

A. West side.

Q. Northwest or southwest side of the straits?

A. Southwest.

Q. Southwest side of the straits? And you say that you left the bunkers at about four o'clock in the morning. Where did you go then?

A. I was on my way to Point Richmond.

Q. What course did you take with reference to the stream?

A. Southerly course” (p. 82).

A mariner who refers to the east side or west side, or even northwest—or southwest side of the straits, betrays the densest ignorance of the compass bearings in that locality, and it is easy to see that the “Meteor” would never have arrived within hailing distance of the “Ada Warren” that morning, had she really, as her master says, taken a southerly course after she left the bunkers at Port Costa; it would be more likely that she would, like Noah’s ark, be perched upon the hills behind Port Costa.

We do not claim that the mere fact that an unlicensed pilot, and one who was obviously unfamiliar with the waters about the straits, was at the helm of the “Meteor”, at the time of the collision, fixes of itself the responsibility therefor; yet these

circumstances may well be taken into consideration in determining the question which party was at fault.

The Hunter No. 2, 22 Fed. 795.

2. *The "Meteor" navigated as if she had the right of way. As a matter of fact the tug and tow had the right of way.*

The master of the "Meteor" knew when he first sighted the lights of the "Warren", three miles away, that they signified a tug with a tow by her side (p. 102). He knew that she was impeded by her tow, and also by the fact that she was coming on with the tide. From the direction which the green light seemed to be traveling, he thought that it was making for South Vallejo, crossing the straits (p. 85). The "Meteor" went full speed ahead, at the rate of eight knots, without signalling, towards the impeded vessel for about five minutes, during all of which time the green light was near his bow. The fact that the "Meteor" was steaming against the tide made her more easily navigable than she otherwise would have been (*The Jamestown*, 114 Fed. at 594). On the other hand, the "Warren" was going with the tide and was further obstructed in her navigation by a heavy stone barge and was presumably struggling against the cross-currents prevalent at the straits, which the pilot of the "Meteor" should have known, had he been familiar with the locality. If the "Warren" had been really going to South Vallejo, the

“Meteor” had ample room and time to go around her stern; indeed it would have been quite “natural” to do so.

Under these circumstances the “Meteor” was at fault in approaching a light which, during all the time it took the “Meteor” to traverse 3 intervening miles, had only changed from a little port, to barely starboard, on the stubborn theory that she had the right of way.

The situation was governed by the rule that

“While a tug and tow are ordinarily considered as one, and that a steam vessel, subject to the general sailing regulations, yet as between a tug incumbered with a heavily laden tow, and a steam vessel whose movements are unhindered, the *tug and tow have the right of way, and the other should avoid them.*”.

Spencer, Collisions, sec. 129.

“A large steamer, without tows or other incumbrance, approaching near to smaller ones with tows, under circumstances where collision is liable to occur, is *bound to move with caution*. She is mistress of her course and motions, and stands in a *position of advantage* over the others. These have not full power over themselves.”

The Syracuse, 9 Wall. 672.

In *The Lucy*, 74 Fed. 572 (C. C. A., 4th Circ.), the Court said:

“The manifest duty of the *Lucy*, an unincumbered steamer, in full control of her master and pilot, was to keep out of the way of the approaching tug and her heavy tow (*The Syra-*

cuse, 9 Wall. 672), and to avoid the risk of collision.”

In *The Alabama*, 114 Fed. 214, the Court said:

“The tug and tow occupied the position of an *encumbered* vessel, and a duty was imposed upon the steamer, having full control of its own movements, to keep out of the way.”

In *The Jamestown*, 114 Fed. 593, the Court said:

“The tug with the tow occupied the position of an *encumbered* vessel, and the *Jamestown* was free, and, under the circumstances *should have been navigated with caution*; and, unless it appears that the encumbered vessel was at fault, it will be presumed that the collision was the result of the *Jamestown*’s negligence. An unencumbered vessel approaching a tug with tow should keep out of the way. * * * There was nothing in the existing conditions to prevent the steamship’s keeping out of the way of the tug and tow; and having seen the same the distance it admits it was observed, * * * *knowing that the tow was moving with the wind and tide*, it should have exercised a greater degree of care and caution than it did in approaching the tow. Any error should have been on the safe side. It was not enough to have so acted or changed its course as possibly, *or even probably*, to have avoided a collision. No such chances need or should have been taken.”

In *Mitchell Transp. Co. v. Green*, 120 Fed. 49, a steamer met a tow in a place requiring circumspection. The Court said:

“Being freehanded, she could easily manage herself and in doing this she was bound to consider that the steamer and tow she was meeting

must, in the nature of things, be somewhat cumbersome and unwieldy, and that some *variation* in their several courses was likely to occur. Being master of her own motions, she was *bound to guard against those, and keep out of the way* if she could without peril to herself."

In *The Georgetown*, 135 Fed. 854, 858, the Court said:

"The tug and tow were incumbered vessels; and the duty was imposed upon the steamship, having full control of its own movements, to keep out of their way, and, if needs be, in order to avoid collision, to slacken speed, stop, or reverse her engines. * * * The Georgetown should have done more than that—*she should have avoided the risk of collision.* * * * The avoidance of the risk of collision was the duty imposed upon the Georgetown, and this it has clearly failed to meet."

In *The Westhall*, 153 Fed. 1010, 1013, the Court said:

"The reason for not requiring the same strictness of compliance with the rules of navigation by those in charge of a tug and tow as of those navigating an unincumbered steam vessel is manifest, and as between a steamer and a tug with a cumbersome tow the latter has the right of way, and upon the steamer is imposed the responsibility of exercising extra precaution to avoid collision."

The "Warren" was not only incumbered by an unwieldy tow, but was also under the disadvantage, as compared with the "Meteor", of going with the tide, and under the further disadvantage of passing

into a channel full of cross-currents (pp. 47, 48). In such a case the tow going with the tide has the right of way. Judge Brown refers to this rule as "usual and well established" in the case of *The Osceola*, 50 Fed. 326, 327. He applied it there in a case where two tows approached each other; in other words, he would have given the right of way to the "Warren" even if the "Meteor" had had a vessel in tow instead of being free and unimpeded.

The case of the *George S. Shultz*, 84 Fed. 508, is distinguishable by the fact that the unincumbered steamer and the tug and tow approached each other in broad daylight, and that the tug appears to have been comparatively unimpeded.

3. *The "Meteor" navigated improperly by relying on the theory of "crossing vessels", when in fact, the rule of crossing vessels did not apply to the situation.*

The facts shown by the "Meteor" evidence do not bring her within the situation of crossing vessels.

This rule applies only to cases "where steamers are approaching each other in an oblique direction so as to involve risk of collision". The "Meteor's" evidence shows that the vessels never approached each other so as to involve risk of collision. When the vessels were three miles apart, the "Meteor" was steaming in a westerly direction, 8 knots an hour; the green light of the Warren appeared close to the line of the "Meteor's" course "headed across

the straits". In all human probability the green light, and the vessel it indicated, would be in South Vallejo before the "Meteor" could traverse the distance to the point of intersection between the courses of the vessels. Certainly, there was *then* no "risk of collision". It was highly proper that the "Warren" should pursue her course towards South Vallejo. The situation covered by the rule of crossing vessels had not arisen, nor did it arise at any time. The "Meteor" apparently was satisfied that the tug and tow should go ahead to their destination. The testimony of Captain McFarland, and the libel of the owners of the "Meteor", show that the situation was *safe even after the green light of the "Warren" had crossed his course*. She crossed when she was about 1000 feet ahead of his bow, possibly more (p. 96). In his opinion she would have passed safely, even if the distance had been only 500 feet (p. 97). Even when the green light was $\frac{1}{4}$ point on his starboard bow, "if said tug had continued on said course she and her tow *would have safely passed* the bow of said steamship "Meteor" (p. 11). *A fortiori* they were in a safe position the moment when the green light was traversing the course of the "Meteor", and every moment before that time. Hence the "Meteor" had no right to apply to the situation the "rule of crossing vessels", and to claim under it that the "Warren" violated any duty by going ahead. The "Warren" had the right to go ahead; in fact, it was then her duty to go ahead. That this is the proper view of the situa-

tion, follows conclusively from the "Meteor's" contention that the "Warren" was at fault in turning to starboard and showing both green and red light after she had crossed the "Meteor's" bow and thereby creating a situation of danger.

It follows from this that the "Warren" cannot be charged with any presumption of fault by reason of failure to keep out of the way, under the crossing rule. The latter rule does not apply. The situation, according to the "Meteor's" story, was safe as long as both vessels kept their course and speed. The danger of collision did not begin until the "Warren", three minutes before the collision by the engine-room clock, changed her course and turned back to the path of destruction.

Assuming that the "Warren" performed the latter, improbable maneuver, the proximate cause of the collision was, firstly, the fact that the "Meteor," fully understanding and assenting to the "Warren's" previous course, approached too closely under full speed, and made no attempt to do what was "desirable" and go around her stern, and secondly, the errors of the "Meteor" after the "Warren" approached end on.

4. *The "Meteor" was at fault in approaching too closely at an excessive speed.*

For $2\frac{4}{5}$ miles she shot ahead full speed, at the rate of 8 knots per hour, into the neighborhood of a vessel which she knew to be impeded and which

from first to last was near her course. The master of the "Meteor" kept his course and speed in the belief that the situation was safe: that this vessel, bound for South Vallejo, would pass him before he reached the point of intersection of the courses, and he saw that she was maintaining her course. Under such circumstances the "Meteor" was charged with the responsibility for the correctness of her calculations, and should have left a safe margin by either moderating her speed or giving the impeded vessel a wider berth by starboarding her helm. Indeed, her master admits that this would have been "desirable"; we claim that it was obligatory. Approaching into such dangerous neighborhood without giving a warning signal, without checking her speed, and without changing her course, was the serious fault by which the "Meteor" caused the immediate *danger of collision*.

From another point of view the "Meteor's" stubborn insistence upon her course and speed was inexcusable. The master testifies that, maintaining his speed and course, he would not have run down the tug and tow, even if they had been only 500 feet apart when the "Warren" crossed his course (p. 97). But he admits that the distance to which he could safely approach them without running them down "depended on what angle she was coming" (p. 97). He then testifies:

"Q. What angle was she to your course when she crossed?

A. *That I couldn't say.*

Q. You did not see the barge, or the tug herself, did you?

A. No, sir.

Q. Just saw the lights?

A. Yes, sir.

Q. Could not tell what direction the lights were coming from?

A. No, sir—I could tell what direction, but *I couldn't tell what angle she was coming on.*"

In other words, his testimony is in effect: "To what distance I could safely approach the tug and tow, while maintaining my course and speed, depended upon a fact of which I was ignorant." While in this frame of mind, he obviously had no right to maintain his course and speed.

5. *The "Meteor" was at fault in not giving the danger signal when the "Warren" changed her course.*

The critical moment before the collision arrived *after* the master of the "Meteor" saw the green light of the "Warren" $\frac{1}{4}$ point on his starboard bow, and *when* the "Warren" changed her course, she and her tow "would have safely passed the bow of said steamship "Meteor", if said tug had continued on said course" (Libel, Art. IV; p. 11). Up to that moment the "Meteor" understood the course and intention of the "Warren". *This moment was more than three minutes before the collision*; for the master testifies that he was *backing* 3 minutes *by the engine-room clock* (p. 108). From that moment, and during the three precious minutes

or more following it, there was danger of collision, and the captain of the "Meteor" appreciated it.

"Q. When the one whistle blew from the 'Warren', Captain, did you think that the manoeuvre which it indicated was a reasonable manoeuvre under the circumstances?

A. I did not.

Q. Was it your impression that it was a dangerous manoeuvre at that time? A. I did.

Q. *You considered it that moment, did you not, that there was danger of collision?*

A. *I did.*" (p. 106.)

When the "Warren" suddenly blew one whistle and showed her red light, *at least 3 minutes before the collision*, by the engine-room clock, it became the duty of the "Meteor", under Article 18, Rule III of the Steering & Sailing Rules, to immediately give the danger signal:

"Rule III. If when steam-vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four of the steam-whistles."

The "Meteor" did not give the danger signal. Instead of it, she gave another signal upon which she failed to act. It was her imperative duty, when the critical moment arrived three minutes before the collision, to observe the Rule III.

"This rule in reference to danger signals in case of reversal of steam vessels is an important one to be observed, and it cannot be said that it may not have entered into the causes of

this collision, while the other faults were the real causes, *non constat* that the tug * * * would have adopted a different course, had they supposed that the steamship thought there was an emergency * * * The enforcement of this rule is imperative where steam vessels reverse their engines and move backward, even with a view of avoiding a collision."

The Georgetown, 135 Fed. 854, 858.

The Inspectors' Rule III, as in force at the time of the collision, was as follows:

"If, when steam vessels are approaching each other, either vessels fail to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle; and if the vessels shall have approached within half a mile of each other, *both shall be immediately slowed to a speed barely sufficient for steerage way* until the proper signals are given, answered and understood, or until the vessels shall have passed each other.

"Vessels approaching each other from opposite directions are forbidden to use what has become technically known as 'cross signals'—that is, answering one whistle with two, and answering two whistles with one. In all cases, and under all circumstances, a pilot receiving either of the whistle signals provided in the rules, *which for any reason he deems injudicious to comply with*, instead of answering it with a cross signal, must at once observe the provisions of this rule."

This rule covers the situation which arose after the "Warren" gave one blast and showed her red

light. Evidently the master of the "Meteor" deemed it injudicious to comply with the one whistle of the "Warren"; for, while he answered it, he immediately followed it by a signal indicating the opposite intention from the intention corresponding to the "Warren's" whistle. The three blasts which he gave, in answer to the one blast of the "Warren", was a "cross-signal" and expressly forbidden by the rule. The rule makes it absolutely imperative, in the situation then prevailing, to give *no other signal except the danger signal.*

What would have happened if, three minutes before the collision, the master of the "Meteor" had blown the danger signal?

The "Meteor", presumably following the rule, would have immediately slowed to a speed barely sufficient for steerage way, and the "Warren", notified by the "Meteor" that there was a pressing emergency, would also have immediately slowed to a speed barely sufficient for steerage way. The three or more precious minutes were enough to stop the "Meteor" so that she was practically dead in the water; had both vessels immediately reduced their speed there would have been time enough for them to come to an understanding, by proper signals, and to pass each other.

Thus the failure of the "Meteor" to give the danger signal was a fault which proximately contributed to the collision.

6. The “Meteor” was at fault, after the red light of the “Warren” became visible, in assenting to the “Warren’s” signal without carrying her assent into effect.

When the “Warren” blew one whistle, the “Meteor” at once answered by one whistle. This was not done in extremis; for the master testifies that, between this moment and the moment of the collision, at least two or three minutes elapsed by the clock. The answer of one whistle that the master of the “Meteor” gave to the “Warren”, imported the duty to go to starboard. It was an acquiescence in her coming forward, and in doing so, the “Warren” had the right of way. “Had he wished not to acquiesce, he should have given several short blasts, to indicate it.” (The danger signal.) (*The Osceola*, 50 Fed. 326, 330). The “Warren’s” whistle announced: “I am directing my course to starboard”; the “Meteor’s” answer was: “I am *also* directing my course to starboard.” The answer implied an invitation to the “Meteor” to proceed in the manner announced. It then became the duty of the “Meteor” to *proceed*, to *pass*, and *not* to stop. Had she done what she announced, the vessels would have passed each other port to port in time. Indicating one act and then performing another act; saying: “I am going ahead to starboard”, and then stopping and reversing and projecting herself across the path of the “Warren”—these are faults which proximately caused the collision.

PART II.**The Damages Awarded.**

“Contract Price for Repair	\$9875.00
Cost of Fairing Anchor	34.80
Cost of Crew at San Francisco,	
2 days at \$79.86,	159.72
Cost of Captain and Two Watchmen,	
15 days at Seattle at \$10.87,	163.05
Value of Net Earnings, 17 days	
at \$128.71 per day,	2188.07
Insurance, 17 days at \$33.85 per	
day,	575.45
	<hr/>
	\$12,996.09”

(Ap. pp. 129, 130.)

INTRODUCTORY STATEMENT.

In entering upon a discussion of the amount of damages awarded to libellant by the final decree of the District Court, and the specification of errors relied upon, we quote first from the Report of the Commissioner, upon which the decree purports to be based:

“While there are gaps in the testimony which seek to connect the injuries repaired under the specifications, with the injuries sustained in the collision, the fact seems sufficiently established that the damages reported by Thayer, the San Francisco Surveyor, immediately following the collision, and confirmed by Walker, the Tacoma Surveyor, were the result of the collision”
(Ap. p. 124).

This extract strikes the key note of our objections to the damage awarded to libelant, for it is our contention that the "gaps" mentioned by the commissioner were never filled, and are too wide to be disregarded. In addition, even if such "gaps" might be deemed bridged, the computations by which the damages awarded were arrived at, are erroneous.

We proceed to separately consider the various items of damage which are assigned as erroneous, first stating, in chronological sequence, the facts bearing upon the question, as shown by the matter offered by libelant by way of proof:

CHRONOLOGICAL SEQUENCE OF EVENTS.

1906

Aug. 11th, "Meteor" left Linnton Wharf, Portland
10.25 A. M. with a cargo of lumber, to go to coal breakers, also in Portland, for fuel, and thence to Oakland (Ap. pp. 222, 224).

Aug. 11th, Stem of "Meteor" came in contact
11:40 A. M. with a dolphin at the coal bunkers.
Leaving the coal bunkers, the "Meteor's" propeller struck a sunken snag and a propeller blade was carried away (Ap. pp. 223, 224).

Aug. 12th, "Meteor" stranded off Astoria on a
5:10 A. M. sand bank and was floated in five minutes by working the engine full speed astern (Ap. pp. 223, 224).

- Aug. 30th, "Meteor" surveyed at Seattle (Ap. p. 225).
- Oct. 11th, "Meteor" sailed from Port Costa with
4:15 A. M. part of a cargo of ore, bound to ports on Puget Sound, via San Francisco (Ap. p. 223).
- Oct. 11th, "Meteor" collided with tug "Ada
4:42 A. M. Warren" and a barge, and started for San Francisco, towing the tug (Ap. p. 223).
- Oct. 11th, "Meteor" arrived in San Francisco
10:10 A. M. (Ap. p. 223).
- Oct. 11th & "Meteor" was surveyed and pro-
12th nounced seaworthy for the voyage to Puget Sound (Ap. pp. 223, 232).
- Oct. 13th, "Meteor" resumed voyage to Puget
1:00 P. M. Sound (Ap. p. 223).
- Oct. 18th, "Meteor" arrived in Tacoma, dis-
3:45 A. M. charged part of her cargo, and was there surveyed (Ap. pp. 145, 148, 161, 234, 235, 237).
- Between the 18th and the 23rd, "Meteor" left Tacoma, went to Everett, where she discharged the rest of her cargo, and started for Seattle (Ap. p. 161).
- Oct. 23rd "Meteor" arrived in Seattle (Ap. p. 161).
- Nov. 6th, "Meteor" left Seattle for Rainier and St. Helens, on the Columbia River, to load cargo under a charter-party (Ap. pp. 161, 147, 149).

Nov. 15th, Repairs to "Meteor" completed at St. Helens (Ap. p. 148), and vessel surveyed (Ap. p. 241).

I. Hull Damage (p. 129).

1. LIBELANT HAD THE BURDEN OF SHOWING THAT ALL OF THE INJURIES WHICH WERE REPAIRED AT SEATTLE WERE THE DIRECT RESULT OF THE COLLISION BETWEEN THE "METEOR" AND THE "ADA WARREN".

This is an elementary proposition, and obviously it could be complied with only by calling witnesses who actually saw the collision, and witnesses who could testify as to the condition of the "Meteor" immediately prior to the accident, to show what injury was done by it; and then witnesses who repaired the vessel, to show that the injuries testified to by those present at the accident, and those familiar with her condition immediately prior thereto, were the injuries actually repaired. Evidence that certain injuries found, at a certain time after the accident upon the "Meteor" were repaired, would, of course, be wholly irrelevant so far as the claimant against the "Ada Warren" is concerned, unless it were clearly shown, in addition, that such injuries as were repaired were actually due to the fault of the "Ada Warren" as distinguished from some other cause or causes.

An examination of the entire record will show that the only person called by libelant who could possibly know what damage to the "Meteor" was

done by the "Ada Warren", was the captain of the "Meteor", T. D. McFarland (p. 79). And the testimony of this sole witness, upon this essential point, consists of a statement as to the place where the "Meteor" was struck during the collision (pp. 86, 87) and the following language:

"Q. How great were the injuries to your vessel?

A. The contract was \$9,875 or thereabouts—within a few dollars.

Q. Contract for what?

A. Replacing and repairing the bow and damages done.

Q. And that was the cost of repairing it. What were the injuries to the bow?

A. There were several plates bent and several of her frames broken.

Q. How near the water-mark?

A. Above the water-mark" (Ap. p. 107).

It is apparent from the records that a contract was made by the owners of the "Meteor" for certain repairs on her, and that certain repairs were made upon her, at a time subsequent to the accident, and that the price paid for such certain repairs was \$9,875. It is also shown what items of repair the contract price of \$9,875 covered. But were those certain repairs, which made up this contract price, proved to be repairs of injuries directly resulting from the collision between the "Meteor" and the "Ada Warren"? We submit that there is no proof to that effect. The collision took place in the Bay of San Francisco on *October 11, 1906*, at 4:42 o'clock in the morning. No repairs were made until

October 23, 1906, and then such repairs were not made in or near the Bay of San Francisco, but in Seattle, Washington, after several intervening voyages which consumed in all twelve days (see Chronological Statement above).

In the light of this situation, two questions immediately present themselves:

- A. *May not all or part of the injuries repaired at Seattle have been in existence prior to the collision with the "Ada Warren"?*
- B. *May not all or part of the injuries repaired at Seattle have been inflicted during the period between the collision and the repairs at Seattle, twelve days later, after the completion of several intervening voyages?*

And it is at once apparent that neither one of these questions can be answered in the negative from any information contained in the record.

We proceed to consider them in detail.

A. Not a single witness was called to testify to the condition of the "Meteor" prior to the collision. It is perfectly consistent with everything in the record that just after the collision the "Meteor" was in substantially the same condition that she had been in just prior to the collision. It is more than consistent; the probabilities are in favor of the view that all or part of the injuries repaired at Seattle were in existence prior to the collision. Mr. Thayer, who surveyed the vessel at

San Francisco on October 11th or 12th, says in his report:

“The outside plating or skin of the ship is not broken and its riveting does not appear seriously strained” (Ap. p. 233).

“After careful examination of the damages, I find it to be all above the present water line, that the skin appears unbroken, that the riveting does not appear seriously strained and the frames where cracked have yet a large portion of strength” (Ap. p. 233).

“The ship is partly loaded and bound for a home port on Puget Sound, and in my opinion is in a safe and seaworthy condition for the voyage” (Ap. p. 234).

It seems truly extraordinary that, although the skin of the ship remained unbroken, and the riveting unstrained, at the time of Mr. Thayer's survey, all of the injuries repaired at Seattle should be attributed to this collision. Why may not the frames mentioned by Mr. Thayer (p. 233) have been cracked before the accident, and why may not every defect mentioned by him have been in existence prior thereto? It cannot be said that this is improbable, for the reason that it is not to be supposed that a vessel voyages about with such unrepaired injuries in her structure; for here it appears that the “Meteor” did in fact voyage about for twelve days, involving an ocean trip from San Francisco to Puget Sound, in exactly that state of unrepair. Indeed, it appears that a great part of the damage resulting from the stranding off Astoria, which took place prior to the collision, was

not repaired prior thereto, or even before or at the time she was repaired at Seattle (pp 227-229); and that she did not let that hinder her from pursuing her accustomed way. Why may she not have been pursuing her way for months, or even years, before the collision, in the same, or substantially the same, state as that in which she voyaged to Seattle? And why should respondent have saddled upon it the burden of paying for injuries which were not caused or due to the collision?

The "Meteor" appears to have been a vessel peculiarly enamoured of the perils of the seas, according to the extracts from her log book:

"August 11th, 10 A. M. Finished loading 10:25 A. M., left Linnton (Wharf). When arriving alongside coal bunkers, carried away dolphin composed of 7 piles.

11:50 A. M., * * * when leaving coal wharf struck sunken piles with propeller.
* * *

August 12th, 5:10 A. M., ship struck on sand bank. Full speed astern" (Ap. p. 224).

Why, then, should it be assumed that the damages repaired in Seattle were not in part due to the shocks sustained in these three catastrophies, or to accidents prior in time thereto? The dolphin which was struck and carried away by the "Meteor" consisted of

"* * * one center pile and six bracing piles, all bound together at top by steel wire rope. It appears that the 'Meteor' struck this dolphin stem on, breaking piles off at the bottom and scattering the same, necessitating an entire new

dolphin being driven. The piles are about 14" in diameter at butt and 65 feet in length" (Ap. pp. 227, 228).

The later collision with sunken piles "sent a heavy shock through ship and machinery and at the same time carried away one of the propeller blades" (p. 225). The subsequent grounding off Astoria and the running of engines full speed astern during the five minutes before she was floated, meant a bad strain throughout the ship, also, since some 500 rivets were loosened (pp. 226, 229). And as said above, it appears that a great part of the damages resulting therefrom were not repaired prior to the collision with the "Meteor", or even before, or at the time, she was repaired at Seattle (pp. 227, 229).

Since, then, this vessel was addicted to thrusting herself upon dolphins, piles, sand-bars, etc.; and since she was in the habit of scouring the seas without troubling to first repair the injuries received in the course of such amphibian adventures, we submit that it should not be presumed that she was in perfect repair prior to the collision with the "Ada Warren". Her state prior to the collision was a matter which could and should have been strictly proved by libellant; and because libellant omitted to make such proof, whatever its reasons, is surely not ground for filling this very material gap by hypothetical suppositions and conjectures.

B. In addition to this yawning breach in the proof of damage, viz., the failure to show that none of the damage repaired at Seattle occurred prior to

the collision, the record shows the second mysterious void, viz., the failure of libelant to show that the repairs in Seattle were not repairs of injuries suffered by the "Meteor" after the collision, during the interim covering her voyages from the scene of the collision to San Francisco, from San Francisco to Tacoma, from Tacoma to Everett, and from Everett to Seattle; which is, of course, to say that libelant failed to show that the injuries so repaired were caused by the collision. Bearing in mind the fateful proclivity for catastrophes of this vessel which encountered three serious accidents in attempting to get out of the Columbia River from Portland, on her voyage south:—why should it be taken for granted that, during the twelve days between the collision and the Seattle repairs, she encountered no perilous adventures of the like nature? The libelant evidently hoped that this would be taken for granted, and not a syllable of testimony was introduced to account for this period. It remains a sealed book, under the control of libelant, whose duty it was, we submit, to open it fully and unreservedly. What recitals might not this section from the history of this vessel contain! We can only conjecture what they are. It may well be that the "Meteor", in going to or leaving San Francisco after the accident, collided with many dolphins; that she was in collision on the high seas on the way to Puget Sound; that she was stranded in or after entering the Sound; that she was in collision with the wharf or vessels in Tacoma; that, in proceeding to Everett, she was stranded and in

collision, or that, in leaving Everett and proceeding to Seattle, she encountered one or a series of her customary mishaps. It may be that the repairs made to the "Meteor" in Seattle were in great part necessitated by such happenings on these several voyages from the place of collision, and in her numerous dockings made in the course thereof. And, of course, respondent should not be charged with paying for any repairs consequent thereon. Respondent should and can be charged only with the damage sustained by the "Meteor" through collision with the "Ada Warren". Nor has appellant the burden to show that the injuries repaired at Seattle were not the result of the collision. The burden is clearly upon the libelant below to show affirmatively that all injuries repaired for the contract price were the direct result of the collision. It is not enough that they might have been, or possibly were, due to the collision. It must be shown that they were in fact caused by the collision.

The strangely meager testimony of McFarland, the captain of the "Meteor", above quoted, certainly cannot be said to furnish the necessary link, connecting the Seattle repairs with the injuries actually caused by the collision. He testified merely to the fact of the collision, the place of the impact and a contract price for making certain repairs at Seattle at a time subsequent to the collision. It is entirely consistent with his evidence that a great part of the injuries repaired in Seattle existed prior to the collision, and that a great part of them

was sustained in the intervening voyage from the locus of the collision to Seattle. It is apparent that he is merely testifying as to what he understood, from hearsay, the contract price to be; for it appears that he did not himself make the contract. In the dozen lines devoted to this important point, the captain says absolutely nothing that is relevant in connecting the Seattle repairs with the “Ada Warren” collision. The insufficiency of his testimony is strikingly brought home by propounding to one’s self the question, “*Done by what?*”, after his answer to the question, “*Contract for what?*” (p. 107), said answer being, “*Replacing and repairing the bow and damages done*” (p. 107). Damages done by what? There is no answer, and we are left to conjecture what caused these damages which were repaired at Seattle. Possibly some part of such repairs was the result of the collision. But what part was necessitated by that, and what part by some other cause? That is a *quaere* which the record fails to answer, and which the captain’s testimony deftly evades. The nature of his testimony in this connection recalls forcibly to mind the circumstance that the day after the collision he swore to one set of facts, while in his deposition, subsequently taken, he swore to another and inconsistent set, as has been pointed out in the first division of this brief. The testimony of this witness, if regarded at all, is to be received with great caution and strictly construed against the libellant. He does not say that the contract price covered simply

“*damages done*”; he says that, in addition, it covered “*Replacing and repairing the bow*”. In short, it appears affirmatively from the libelant’s own showing, that the contract in Seattle was for the repair of injuries to the bow *other* than those done by the “Ada Warren”—injuries existing prior to the collision, or injuries occurring subsequent to the collision and prior to the Seattle repairs, or both.

It is remarkable that no further attempt was made by libelant to supply this most essential link in its chain of evidence. Libelant was the only one who could know of facts which would fill this breach. Yet there are not over fourteen or fifteen lines, at the most, which touch the question, and those scant lines are, to say the least, ambiguous and evasive. They are even more:—as pointed out above, they widen, rather than lessen, the gap. Captain McFarland was afforded no opportunity by libelant to say anything further upon the subject. Libelant called no other witness on this phase of the case, although, in the nature of things, there must have been officers of the ship, and others, who knew her condition before and after the collision. The extracts from the log (pp. 224, 225, 234) carefully omit all mention of occurrences during the month of September and the first part of October.

The fair inference to be drawn from this omission to produce evidence upon this point, by not calling witnesses upon it, and particularly by refraining from going into it with witnesses who were

called, is well stated thus in *Starkie on Evidence*, Vol. I, p. 54:

“The conduct of the party in omitting to produce that evidence in elucidation of the subject matter in dispute, which is within his power, and which rests peculiarly within his knowledge, frequently affords occasion for presumption against him, since it raises strong suspicion that such evidence, if produced, would operate to his prejudice.”

It is unnecessary to multiply authorities upon the proposition that a presumption exists that one who suppresses evidence does so because the evidence so suppressed would operate against him.

See:

“*The Sam Sloane*”, 65 Fed. 125;

The Fred. W. Lawrence”, 15 Fed. 635.

Wigmore on Evidence, Sec. 288, thus treats of the principle:

“The failure to bring before the Tribunal some witness, when the party himself claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party *fears to do so*, and this fear is some evidence that the witness, if brought, *would have exposed facts unfavorable to the party*.

“The non-production of evidence that would naturally have been produced * * * permits the inference that *its tenor is unfavorable to the party's cause*.”

C. It may be argued by libelant that the various surveys of the “Meteor”, mentioned in the matter

offered by libelant as proof, supply the missing links. We therefore proceed to carefully inspect the soundness of such a theory.

(a) The first survey alluded to was held at Seattle on August 30, 1906, after the ship had carried away the dolphin, struck the sunken piles, stranded off Astoria, and made a voyage thereafter, unrepaired, to San Francisco and back to Seattle (pp. 225, 226, 227). The vessel was found to be considerably damaged, and *a portion* of the injuries seem to have been repaired (though it is very difficult to see how this survey could have been completed, recommendations for repairs given, and the repairs themselves made all on one and the same day—August 30, 1906, as the surveyor intimates) (pp. 225, 226, 227). But, at any rate, a very large part of the repairs, involving an expenditure of \$1995.40 (p. 228), found on this survey to be necessary, were not made at this time, and were never made until after the collision, and after the repairs at Seattle of alleged collision damage (pp. 227, 228, 229, 230). It therefore appears that the “Meteor”, on August 30th, was in a state of substantial unrepair; and that this state was not remedied prior to the collision.

And it is a fair presumption that the state of unrepair, found by this survey on August 30th at Seattle, was aggravated by injuries sustained, or even by ordinary wear and tear, after this survey and prior to the collision. No other survey was

ever held before the accident which involved the "Ada Warren". The next survey after that of August 30, 1906, was that in San Francisco on October 12, 1906, held after the collision. In the interim between the Seattle survey of August 30 and the collision—a period of over forty days—the "Meteor" was pursuing her business as usual, and we find her on October 11, 1906, bound from Port Costa to Puget Sound via San Francisco, with a cargo of ore. How fruitful of calamities may not those forty Lethean days have been! In the course of two days—August 11th and 12th—this ship, through her own activities, without aid from any outside human hand and without the intervention of any unusual natural agency, damaged herself three separate times. In the course of these forty days of profound silence, at this casualty rate, she may have implicated herself in sixty such episodes; and whereas, during the period in which the three accidents occurred, she was in the sheltered waters of the Columbia River, during these forty days she was in and out of divers ports and upon the high seas, exposed to far greater and more numerous hazards. Furthermore, it is to be remembered that the three misfortunes did not involve the negligence of other human beings, whereas, during the forty days, she was open to injury from such causes, as well as to the perils of entering and leaving many ports and of the high seas. On the whole, it is extraordinary that not the faintest whisper of explanation of this period should have been vouch-

safed by those who alone knew of that phase of the life of this ship.

As pointed out above, the next survey after August 30, 1906, was at San Francisco on October 11, 1906. This survey, of course, was simply of the vessel as she then was. Any damage found upon her may have resulted from causes operating upon her in the period elapsed since the Seattle survey of August 30th, a period of over forty days. The fact that certain injuries were found upon her proved nothing more than their own existence, and could only be connected with their cause by the appropriate testimony which is here lacking.

(b) Next the question arises whether, by a comparison of this San Francisco survey (p. 232) and the subsequent survey at Tacoma on October 18, 1906 (p. 234), it appears that the period between October 11, 1906, and October 18, 1906, has been satisfactorily accounted for. For, unless it is so explained, it remains a blank, such as that furnished by the 40 day period heretofore mentioned. And when so examined, not only is there a failure to show that the "Meteor" did not sustain additional damage during such time, but it appears affirmatively that she *must have* sustained further injuries.

In the San Francisco survey (p. 232) it was found that *five* frames were cracked and three frames set in or bent. In the Tacoma survey (p. 234) it appears that *fifteen* frames were broken

and bent. In the latter survey, the sheer strake (the strake of outside plate, level with the deck) first and second from the stem (for we assume the word "stern" (p. 235), is a misprint for "stem") was damaged, and also the first, second and third strakes below were damaged. The former survey shows no damage to the first, second or third strakes below, and only by inference does it show any injury to sheer strakes, first and second from stem. The former survey shows no injury to the bulwark plate, except that its riveting to sheer strake was sheared. The first survey recites that "the outside plating or skin of the ship is not broken, and its riveting does not appear seriously strained". The second report shows "a great number of the butt and landing rivets started and strained to shearing point"; and also "panting beams" (i.e. beams fitted between decks in the forepeak of the vessel to prevent outward and inward vibration) "adrift at both ends and many rivets in braces and stringers started and strained—estimated quantity about 500". None of these damages appear to have existed at the time of the San Francisco survey. The first survey found one "stringer bent and the breast-hook in same crimped". The second survey found three stringers "badly buckled from stem to collision bulkhead". The second survey, in addition to those above mentioned, found also the following injuries, none of which are found in the San Francisco report: The hook plate at side stringers and Orlop deck badly buckled from stem

to collision bulkhead; in connection with the collision bulkhead, "the bounding bar slightly bent and many rivets started in the same"; and "panting beams adrift at both ends". The second report shows two small doubling plates and twelve shell plates damaged, while the first report shows no such number of damaged plates. The second report shows the "shank of port bower anchor badly bent", whereas no mention of such or any damage to the anchor is made in the first.

In view of the fact that the San Francisco surveyor, "after a careful examination of the damage," (p. 233) made his report thereon, the fact that the subsequent report of the Tacoma surveyor discloses much damage in addition to that found at San Francisco, points unmistakably to the conclusion that part of the damage repaired at Seattle was damage not sustained by the "Meteor" in her collision with the "Ada Warren". In some manner or other the injuries received in the collision were added to or aggravated during the period between the accident and the Tacoma survey. It may be that the additional injuries came from new collisions and accidents during that time, or through the agency of the seas and winds acting upon the already damaged portions. No explanation has been offered by libelant in this behalf, although libelant is the only one who was in a position to make one.

It, therefore, appears, that these serious gaps in the testimony, both prior and subsequent to the collision were never filled.

D. Furthermore, it is to be noted that the repairs of the alleged collision damage were not made at San Francisco, the nearest available place where facilities for such repairs existed. Instead, the vessel voyaged about for twelve days and finally was docked at Seattle for the purpose. She was there repaired in a dock where there were no cranes or facilities for such work as lifting plates (p. 150). No excuse is offered to show why she was not taken to a dock where such ordinary and usual facilities exist; or to show why she was taken there instead of being repaired at San Francisco, the natural place for that purpose. The cost of repairs in San Francisco, the nearest available place to the scene of the accident, may have been only one-half as great as the cost of the same repairs at Seattle, and, owing to proper facilities, might have taken only half as long.

The law upon these points is that, when the actual cost of repairs is relied upon as proof of damage, as was the case here, such repairs should be fairly made, and at once. And if repairs are made *at different times, after intervening voyages* which may aggravate the injuries, *a reasonable deduction* must be made.

The Henry M. Clark, 22 Fed. 752;

The John F. Gaynor, 124 Fed. 743;

The Thomas P. Way, 28 Fed. 526.

We respectfully submit that, at the very least, a substantial reduction is in this case a reasonable deduction, and that such a deduction should be made. In concluding the consideration of the mat-

ters under this head (and these matters have of course a direct bearing upon all of the other items hereafter discussed), we submit that the language of the Supreme Court concerning the apportionment of repairs between the owners and the charterers of a vessel applies, *mutatis mutandis*, to the present situation:

“When she reached New York, after having been discharged from service, it is stated in the findings that she was ‘generally repaired throughout’. What portion of these general repairs was chargeable to the injuries covered by the marine risks which the owners assumed, and what portion, if any, was chargeable to the injuries caused by war risks which the government assumed, cannot be determined from the record.”

Strong v. U. S., 154 U. S. 632, at 634.

To paraphrase this language as applied to the present case:

‘When she reached Seattle, after having made divers intervening voyages after the collision in question, it appears that she there underwent certain repairs. What portion of these repairs was chargeable to the injuries caused by events other than the collision, before or after the same, and what portion, if any, was chargeable to the injuries caused by the collision, cannot be determined from the record.’

II. Cost of Fairing Anchor (p. 129).

There is not the remotest connection between the collision with the “Ada Warren” and the repairs

made on this anchor. Its condition, prior to the accident, is not disclosed; *it appears to have been in proper condition on October 11th*, when the "Meteor" was surveyed at San Francisco, since that survey makes no mention of it; and the period between the San Francisco survey and the Tacoma survey has not been shown to have passed without injury to this anchor. The record seems to establish conclusively that it was damaged after the collision, and prior to the Tacoma survey.

The contentions respecting the failure to connect the hull damage repaired at Seattle with the collision apply here with particular force.

III. Cost of Crew at San Francisco, Two Days (p. 129).

The collision occurred at 4:42 A. M. on October 11, 1906 (p. 223), and a survey was held of her October 11th or 12th, in which she was found seaworthy for a voyage to Seattle (p. 234). On October 13th, at one o'clock P. M., she resumed her voyage from San Francisco (p. 223). From 4:42 A. M. on October 11th to 10:10 A. M., she was pursuing her way as if no collision had happened (p. 223). Being seaworthy for her voyage, she could have left San Francisco on the 12th. Therefore, at most, cost of the crew should be allowed for only one day.

But it is submitted that no allowance should be made for any part of this item, as it has not been shown that the "Meteor" would not have remained

at San Francisco during this period even had there been no collision. So far as appears, she remained at San Francisco for this time voluntarily, and for her own purposes and benefit, in which case respondent should not be charged with her expense. If any repairs were made there, they were unnecessary, for the San Francisco surveyor did not recommend them and pronounced the "Meteor" seaworthy for the voyage to Puget Sound (p. 234). Libelant cannot make unnecessary repairs, by doing so delay the ship, and then charge the respondent with the time and expense lost in such useless expenditure, as well as for the time and expense lost in making permanent repairs.

In addition, the breaches in the chain of proof of damages, considered fully under head I above, equally affect this item.

IV. Cost of Captain and Two Watchmen at Seattle, 15 Days (p. 129).

The "Meteor" arrived at Seattle on October 23, 1906 (p. 161). She left Seattle November 6, 1906 (pp. 161, 147, 149). The period between these dates, if we adopt the ordinary method of computing time, and exclude the first and include the last day, totals *14 days*. If both the last and the first are excluded, it amounts to *13 days*. And we submit that both days should be excluded. If the vessel, pursuing her own business, arrived in Seattle at 11:59 P. M. on October 23rd, and left at 12:01

A. M. on November 6th, surely respondent should not be charged for the days October 23rd and November 6th. At the very least, one of these days should be excluded. The Seattle delay should be fixed at *13 days*, or, at most, at *14 days*, instead of *15 days*.

Of course the same gaps in the testimony as were specifically pointed out above in considering the hull and anchor damage apply equally here, as a large part of the present item may have resulted, and in fact did result, from delay necessitated by damages other than those directly caused by the collision. For example, the repair of the anchor would occupy some time, and it appears that the anchor was not damaged in this collision, but by some other cause. If any allowance is made under this head, it should be substantially less than that found in the Commissioner's report.

V. Value of Net Earnings—17 Days (p. 130).

The arguments under the previous headings, as to the missing links in the chain of evidence, are equally applicable here. It hardly requires other authority than the dictates of common sense to support the proposition that loss of time during repairs for which libellant may recover must have been made necessary by the collision, and that the burden of proving that fact is upon the libellant. The rule has been so stated in:

The Loch Trool, 150 Fed. 429;

The Saginaw, 95 Fed. 703.

There is, by reason of those gaps in the chain, no connection established between this item of net earnings, or demurrage, and the collision. The greater part of it, for the reasons heretofore fully set forth, may have been due to injuries other than those caused by the "Ada Warren" collision. Some part of it undoubtedly was due to causes other than the accident here in question.

The contentions under IV are also applicable here, and it is submitted that the greatest time which should be allowed for demurrage should be *13 days* at Seattle and no time at San Francisco.

Aside from these two aspects of this item, however, it does not appear that any loss was in fact incurred by libelant through this delay. The law, as to when there can be recovery for loss of time during which a vessel injured in collision is under repair, is well settled by the above cited cases, and may be stated briefly as follows:

1. It must be shown that the vessel would have been profitably employed during the period of her detention; that an actual loss occurred.

2. The amount of such loss must be shown by reasonable proof.

The Loch Trool, 150 Fed. 429;

The Saginaw, 95 Fed. 703.

And the burden of proof is held to be upon the libelant, of course.

As to the first point, it appears in the record that the "Meteor" was under charter for a trip

immediately succeeding that on which she was injured (p. 261), and that she did not lose this charter by reason of the delay (p. 167).

It also appears that the time spent in Seattle would have been spent there, for the benefit of the ship, even had there been no collision; for libelant's witness Walker says that the time during which the repairs were being made was consumed by the engine-room crew, the deck crew, with the junior officers and the master and the steward in "preparing for the next voyage" (pp. 151, 152). It necessarily follows that if this work was "preparatory" for the next voyage, it was necessary for the ship and entailed the detention during that time on grounds which had nothing to do with the collision.

As to the second point, the amount of loss is incorrectly computed, and is not supported by reasonable proof. The daily net earnings are said by the Commissioner to amount to \$128.71 per diem. This sum is arrived at by dividing \$14,801.76, the net earnings of the vessel shown by the voyage sheets (pp. 267 to 276) during voyages extending from June 30, 1906, to October 22, 1906, by 115, the full number of days said to be covered by the voyage reports (pp. 267 to 276), according to the Commissioner (p. 126). But there is error in dividing by 115. The number of days covered by the voyage reports is the number of days from June 30, 1906, to October 22, 1906, which is 143. Dividing the \$14,801.76 by this number, the net

earnings per day come to only \$103.50, which very materially reduces the figure allowed by the Commissioner for this item of demurrage. The days she was idle in port should be included in the computation, which was not done by the Commissioner.

And the per diem earnings must be reduced still further; for, during the times of the repairs, the "Meteor" was not undergoing any wear and tear, and was not subject to the ordinary risks of navigation. Therefore, as has been held, the same rate of compensation as when in use should not be allowed, but a deduction should be made.

The W. H. Clark, 29 Fed. Cas. No. 17,482.

VI. Insurance—17 Days (p. 130).

Aside from the effect of the serious gaps in the evidence, heretofore adverted to, upon this item, this point has been definitely settled by this Court in the case of:

The Tremont, 160 Fed. 1016, at 1031 (D. C.);
The Tremont, 161 Fed. 1, at 2 (C. C. A. 9th
 Circuit).

The District Court expressly disallowed this item, and was upheld by this present Circuit Court of Appeals, which said:

"* * * but the Court below correctly refused, in our opinion, *any* allowance for insurance premiums, and general office and agent's expenses during that period."

This case is very weighty upon the question, since the damages were not referred to a Commissioner, but were, in the first instance, determined by Judge Hanford. He allowed a rehearing of the matter and therein took this view of the propriety of allowing insurance premiums. And the conclusion reached after this careful consideration was expressly sustained and approved by this honorable Court. Nor is there any authority in conflict with this view. It is impossible to see how such an item fulfills the requirement that only those losses are recoverable which *directly* result from the collision. Furthermore, the only testimony upon the amount of per diem insurance was that it was "about thirty-five dollars" (p. 175). There is no evidence that it *was* that much. It may have been much less than the rate allowed by the Commissioner.

VII. Interest on Detention Award (p. 130).

The Commissioner and the Court allowed interest on the demurrage. This, independently of the bearing of the aforementioned missing links of evidence, was improper and contrary to the authorities, for "in the majority of cases reported, such allowance has not been granted".

Spencer on Collision, Sec. 204, pg. 375;

The Eloina, 4 Fed. 573;

The Sitka, 156 Fed. 427 (D. C.), affirmed in

The Sitka, 159 Fed. 1023 (C. C. A.).

Particularly, under the imperfect proofs in this case, such interest should not be allowed.

VIII. Interest on Bill for Repairs (p. 130).

The Commissioner allows interest on the bill for repairs—\$9875—from the date of its payment, November 27, 1906 (p. 130). The District Court expressly confirmed the Commissioner's report in all respects (p. 197). And yet, in the face of this, the decree purports to allow interest on all items, including the repair bill, *from November 20, 1906* (p. 197). Obviously, even disregarding the effect herein of the aforementioned gaps in the evidence, the District Court erred in allowing interest on the repair item from the 20th, and it should have been allowed only from November 29, 1906, the date when libelant lost the use of that sum of money. Otherwise libelant would be collecting a double interest upon the same fund. Such is the rule well established by all the authorities:

The Mary Doane, 16 Fed. Cas. No. 9205;

The Sitka, 156 Fed. 427 (D. C.);

The Sitka, 159 Fed. 1023 (C. C. A.).

IX. Interest on Amount Decreed (p. 197).

It follows from VII and VIII, aside from the effect hereon of the gaps in the evidence, that there was also error in allowing libelant interest on \$17,704.00 from the date of the decree, that

amount being based upon the above erroneous allowances of interest on the demurrage and repair item.

In conclusion, it is again respectfully submitted that, in addition to the errors in computation above designated, the proofs are wholly insufficient and uncertain and do not justify the imposition upon respondent of the large amount of damages awarded by the lower Court, for the reason that the damages covered by said amount are not shown to have directly resulted from the collision with the "Ada Warren". And respondent should not be made the martyr of conjectures, necessitated by the incomplete, unconnected and loose proofs furnished by libelant. The very minimum of relief to which respondent would be entitled, if entitled to any relief, is a substantial reduction of the amount of damages awarded, pursuant to the foregoing contentions and authorities.

Respectfully submitted,

LOUIS T. HENGSTLER,
Proctor for Appellants.

No. 2267

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANIEL E. MORRIS, LOUIS A. LLOYD
and J. A. MAGUIRE, as trustees of the
WARREN IMPROVEMENT COMPANY (a cor-
poration), claimant of the tug "Ada
Warren", her tackle, apparel and furni-
ture,

Appellants,

vs.

THE GLOBE NAVIGATION COMPANY
(a corporation),

Appellee.

BRIEF FOR APPELLEE.

Concerning certain so-called "new" evidence, on facts admitted in our opponent's pleadings, and with which he seeks to contradict the pilot and master of his own vessel.

In this cause we expect to show that the tug "Ada Warren" violated the statutory rules of navigation in four respects other than in the exchange of signals, which is made the basis of so large a portion of

appellant's brief. As we do not accept the statement of the case as made by our opponent, we shall restate the facts at length, as we understand them.

Preliminarily, however, we will deal with what our opponent calls "*new*" evidence which, the record shows, was submitted to our opponent over *three years ago* on the reference to assess damages, after the hearing and entry of the decree on the question of liability for the collision, and over two years before the final decree from which the appeal here was taken—a somewhat mature "*newness*", we suggest.

This evidence consists of an alleged affidavit of Captain McFarland, in which his account as to the giving of the passing signals appears to differ from his evidence at the trial.

Our opponent's brief is unsparing of the witness, although no motion was made for a new hearing to introduce the affidavit in evidence under the issue of responsibility for the collision, and thus give the witness a chance to explain it. It is also scarcely veiled in its insinuations against counsel. It has a personal note of accusation, calling for the exercise of the highest good faith in stating the facts from which it would have the court draw an inference as grave as it suggested. And yet, although the sole conflict raised by the so-called new evidence is as to which of the two vessels blew the first one blast whistle, our opponent omits to state the not unimportant fact *that this was never an issue in the case, as his own answer, sworn to by his own captain, alleges that the "Ada Warren" blew the first whistle,*

one blast, and turned his vessel to her starboard, the exact manoeuvre described in the libel (p. 11).

We submit that it is most extraordinary that counsel should seek through pages of his brief to convince the court that, by reason of the discovery of the affidavit of the captain of the opposing vessel, he for the first time learns how his own vessel happened to ram the "Meteor", namely, by the "Meteor's" one blast whistle calling her back after she had crossed the "Meteor's" bow, when he himself claims in his answer (pp. 22, 23), and in his cross libel (p. 29), that the "Ada Warren" blew the first whistle and *that the collision arose because of the "Meteor's" "failure to respond to and act upon the signals of the 'Ada Warren' "*.

This answer was verified by the "Ada Warren's" captain, on November 23, 1906, over two months before the deposition of Captain McFarland. After the verification of the answer, and before Captain McFarland's deposition was taken, the United States Inspectors examined into the cause of the wreck, at which the witnesses from both vessels testified.

At that inspectors' hearing, the "Ada Warren's" pilot testified that he first blew a one-whistle signal, and that the "Meteor" violated the rules by responding with a two-whistle blast (263). This was the original theory of the "Ada Warren's" answer. At the beginning of the hearing, in the District Court, counsel amended his answer by striking out the allegation that we responded with the two-whistle cross signal, and we proceeded to try the case with his

admission in his answer that the "Ada Warren" had blown the first one-whistle signal and the claim that the "Meteor's" failure to respond caused the collision. From the beginning of this case to the writing of his brief in this court, our opponent has claimed that his own pilot gave the first whistle and that point has never been in issue.

The pertinent portions of the "Ada Warren's" answer are as follows, the portion stricken out by the amendment being indicated:

In order that the court may clearly see the anomalous position of our courteous opponent, we offer the following from his brief, which the court should consider in connection with the allegation of his answer that his own vessel blew the first whistle:

"It could not be seriously denied that the question, which one of the vessels gave the first signal, was a material and vital question in this case. It is the *cardinal issue*."

Brief of Prof. Hengstler, p. 28.

"That just as she was rounding a point near the place called 'Oleum' and entering the said straits, a red light was seen a little to starboard by those in charge of and navigating said tug, which red light proved to be the port light of the steamship 'Meteor', coming down the stream at a considerable rate of speed. The tug 'Ada Warren' thereupon blew one whistle to indicate her intention to go to the starboard

of said approaching vessel* and ported her helm. That in the moment when said signal was given and said manoeuvre executed, it appeared to those in charge of the tug that but for said manoeuvre the fast approaching vessel of large size would strike the tug or her barge amidship and probably sink them or one of them. ~~That said signal of one whistle was not answered by said steamship, but after a short interval of time two whistles were heard coming from said steamship and simultaneously she showed her green light in close proximity.~~ A collision then appearing impending and almost inevitable, the officer in charge of the watch on the tug, in order to ease the blow which he expected the tug and her barge to receive, gave three whistles and signaled to the engineer of said tug to reverse, full speed astern. Immediately thereafter the steamship and the barge came together. That, owing to the excessive speed of said 'Meteor' in the locality where said vessels met, and to her failure to respond to and act upon the signals of the 'Ada Warren', and to the change of the 'Meteor's' course to her port, the collision between the two vessels occurred in spite of the effort of the tug to keep out of the way of said steamship;''

Apostles, pp. 22, 23.

The significant part of all this is that the answer was not framed in haste before the facts were known,

* The answer here sets forth a plain violation of the Inspectors' Rules for inland waters, which requires blowing of two whistles when one desires to pass to the starboard of an approaching vessel. As a pleading this would hardly seem to warrant the censorious and critical tone of its author's brief.

but was consciously given its present form, after they had been fully thrashed out before the United States Inspectors.

We now see why our opponent did not move for a new trial in the lower court. This would have required an affidavit of newly discovered evidence *pertinent to the case*, and he had none to offer. The statement of the alleged affidavit of the captain, which he would have asked to have introduced, contradicted his own pleadings. The utmost that our opponent can say of Captain McFarland's testimony on the question of the passing signals, is, that whatever he may have said before that time, when under examination in this case he told the exact truth, as the "Ada Warren's" captain and proctor well knew and claimed it to be.

It is submitted that in view of the above facts, it becomes a matter of indifference *to the issue in the case* whether McFarland did or did not make the affidavit in question. It is further submitted that our opponent, by his acquiescence in McFarland's testimony supporting his own answer, for over a year at least after the alleged contradiction affidavit was in the record, and before the decree was entered, and failing to move for a rehearing in the lower court, is not in a position to ask this court to consider the affidavit. It is further submitted that, in any event, the affidavit, even if it were pertinent, had never been introduced in evidence as affecting the issue of liability, and hence that it can only be considered here after granting a motion for a reference at which

evidence may be introduced to meet the facts it tends to establish.

However, as we shall show in the course of this brief, Captain McFarland's testimony is entirely unnecessary to support our case, in view of the evidence given by a disinterested eyewitness, a quartermaster who was a passenger on the tug, and the admitted facts. Were it not for the reflection on Captain McFarland, a man of high standing in his profession who has had no chance to explain the alleged inconsistencies, we would assent to the entire elimination of his testimony.

The witnesses and contested facts.

As we have already pointed out, there was no dispute as to the nature of the whistles blown. Our opponent's answer admitted that the "Ada Warren", while on a course crossing the bows of the "Meteor", so that the "Meteor" would strike the "Ada Warren" amidships, erroneously and improperly blew a one-whistle blast for the purpose of passing to the "Meteor's" *starboard* (p. 22), in violation of rule ^{the inland} ~~of article 18 of the inland rules~~, and that the "Warren's" helm was put to port, which would turn her head toward her starboard, ~~and~~ to pass the "Meteor's" port. It alleged that the collision arose from the "Meteor's" failure to manoeuvre according to this signal. The "Meteor's" libel claimed this same thing, namely, that the "Warren" was on a course crossing the "Meteor's" bows, showing her green light, when

she turned to starboard, showing both lights, and ran into the "Meteor" (p. 11).

There were two disputed questions of fact, namely, (1) Where was the "Ada Warren" when she blew her one blast of the whistle with reference to her admitted course across the "Meteor's" bow, whether or not the "Ada Warren" had crossed it when she blew her whistle? (2) What happened after the "Ada Warren" blew her one blast?

It was also disputed as to whether the vessels met on the port or starboard side of the channel, but Judge De Haven gave his decision solely on the "Ada Warren's" fault in crossing the bows of the "Meteor". As the channel at the point of collision is nearly a mile wide he probably did not care to rest his decision on the narrow channel rule. Appellant's brief does not claim that there was any violation of this rule on our part.

It was our contention that the "Ada Warren" had crossed the bows of the "Meteor" and was on her starboard side when she (the "Warren") blew the one whistle and turned back and into the "Meteor".

In order to prove these matters in dispute we offered two eyewitnesses, Richard Miller and Captain McFarland, one from each vessel. Richard Miller was a seaman of long experience, and had formerly been quartermaster on steam vessels. He was a passenger on the "Ada Warren", an independent eyewitness, without interest in either side of the controversy.

Eliminating entirely Captain McFarland's testimony and taking Miller's alone, our case is entirely made out.

On the other hand, the "Ada Warren" offered no eye-witnesses of the collision whatsoever. Our libel tendered the issue of her improper navigation, but neither the "Ada Warren's" pilot in charge nor her lookout were called. The pilot was found to be "untrustworthy" and hence was not produced. Her lookout, a seafaring man liable to depart on long voyages at any time, whose deposition was not taken in the fourteen months between the collision and the trial, could not be found on a search a few days before the trial. No continuance was asked to procure his testimony. Although the libel alleged that the tug had not backed her engines before the collision, neither the tug's engineer nor the fireman were produced to show that she reversed or that they heard any whistle from either vessel. No excuse was given for not producing either engineer or fireman, and no continuance asked to hunt them. Were they also "unreliable"? It is a fair inference that they could not be relied upon to prove that the "Ada Warren" had not been in fault.

"It is familiar doctrine that the failure of an employer to call a witness who was in his employ at the time of the accident, and is presumed to be friendly and to have some knowledge of the accident, without any attempt to explain the reason of the failure, raises a strong presumption that the testimony of the employee would be damaging to such party."

Hicks v. T. Co., 62 N. Y. Supp. 597, 599.

“Where evidence which would properly be part of a case is within the control of a party whose interest it would naturally be to produce it, and, without satisfactory explanation, he fails to do so, an inference may be drawn that it would be unfavorable to him.”

Hall v. Vanderpool, 156 Pa. St. 152.

This is deemed “one of the strongest and most satisfactory rules for weighing evidence”, it being said that,

“Since experience teaches that a man will use every means in his power which would avail him in the hour of trial, physically or as a litigant, it may well be expected that he would call a witness who is at hand and cognizant of the facts in dispute, if he did not know that the witness would testify against him.”

Moore on Facts, Sec. 563.

In *Union Trust Co. v. McClellan*, 21 S. E. 1025, the court says:

“Where the burden is on a party to prove a material fact in issue, the failure, without excuse, to produce an important and necessary witness to such fact raises the conclusive presumption that such witness’s testimony, if introduced, would be adverse to the pretensions of such party.”

Cited also in

Garber v. Blatchley, 51 W. Va. 147.

The only witness produced for the “Ada Warren” was Captain Hammer, who was asleep in his bunk at the time of the collision, and he was introduced solely on the issue as to where the vessels lay after the collision. Says the counsel for the “Ada Warren”, none but *sleeping* witnesses need apply, my case shall

be made of dreams! And this from one who preaches so royally of the duty of counsel to give the court all the evidence he can obtain.

Judge De Haven had the witness Miller before him and had abundant opportunity to judge of his veracity and power of observation. No eyewitness was offered to contradict him on any of the facts as to the movements of the vessels relative to each other. Under the familiar rule of this court, it will not set aside Judge De Haven's decree if Miller's testimony supports it.

"The question is not what the conclusion of this court should be on the testimony but whether the commissioner's report, sustained as it was, after full argument, by the District Court, was so clearly erroneous as to warrant us in setting it aside. The powers conferred upon a commissioner in admiralty causes are analogous to those of masters in chancery and his findings upon questions of fact *depending upon conflicting testimony* or upon the credibility of witnesses should not be disturbed unless clearly erroneous."

La Burgoyne (C. C. A.), 144 Fed. 781 at 783.

See, also,

Coastwise Transportation Co. v. Baltimore Steam Packet Co., 148 Fed. 837 (C. C. A.).

In the case of *The Captain Weber*, tried before the District Court, Judge Ross said, relying on many cases there cited:

"The evidence was given in open court, and is substantially conflicting. The well settled rule in such cases is that the decision of the district judge, who has had the opportunity of seeing the wit-

nesses, hearing them testify, and judging of their credibility, will not be reversed unless clearly against the weight of evidence. *Th Allejandro*, 6 C. C. A. 54, 57; 56 Fed. 621; *The Sampson*, 4 Blatchf. 28, Fed. Cas. No. 12,279; *The Sunswick*, 5 Blatchf. 280, Fed. Cas. No. 13,625; *The Thomas Melville*, 37 Fed. 271; *The Albany*, 48 Fed. 565; *The Warrior*, 4 C. C. A. 498, 54 Fed. 534; *Duncan v. The Gov. Francis T. Nicholls*, 44 Fed. 302; *Taylor v. Harwood*, Taney, 446, Fed. Cas. No. 13,794."

The Capt. Weber, 89 Fed. 957 at 958.

We will examine the testimony of this disinterested witness in connection with the admissions of the "Ada Warren's" answer and other admitted facts, and show that not only does it support the decree, but that the court could have rendered no other decision.

The testimony of Miller, taken with the admission of the pleadings and the undisputed facts shows seven violations of the Rules of Navigation and clearly supports the decree.

The "Ada Warren" committed the following errors:

1. The "Ada Warren", having the "Meteor" on her starboard side had the duty of keeping out of the way of the "Meteor" and acknowledged that duty by blowing the first whistle and porting her helm when the vessels were a thousand feet apart, failed to keep out of the way violating article 19 of the International Rules.

2. The "Ada Warren", having the duty to keep out of the way, crossed the bow of the "Meteor" thus violating article 22.

3 and 4. The "Ada Warren", having just gotten safely across the bow of the "Meteor" and intending to continue on the "Meteor's" starboard, erroneously gave one blast and ported her helm bringing her back across the "Meteor's" bow and towards her port side, thus violating the Inspectors Rules requiring two blasts and starboarding her helm if intending to pass the "Meteor" to starboard and violating article 22 in again trying to cross the "Meteor's" bow.

5. The "Ada Warren" failed to reverse before the collision or doing so failed to blow three blasts to indicate that she was reversing, thus violating article 28.

6. The "Ada Warren" failed to place a white light on the starboard bow of her barge thus violating Inspectors Rule XI, par. 7, requiring such a light when towing alongside.

7. The "Ada Warren" placed a white light at the bow and stern of the barge thus indicating that the barge was towed astern in violation of the Inspectors Rule XI, par. 5.

Miller was a passenger on the barge on his way to Ryer Island. The barge was lashed on the port side of the "Ada Warren". He was in the middle of the barge, standing on the boxes of rock, at the time he sighted the approaching "Meteor" (p. 69). He had just before been on the tug, when the engineer gave

him a cup of coffee. The "Ada Warren's" captain tells us the customary route for vessels coming up the Carquinez Straits is to hug close to the south shore and "in skim" the wharves which project from it, on account of the current which sets across to the north shore (pp. 39, 40). Instead of doing this, Miller tells us that the tug came up nearer to the northern shore (p. 67) on her port side, thus violating not only the custom of the river but possibly article 25 of the inland rules, which provides as follows:

"Art. 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

We do not press the point of the violation of the rule on the account of the doubt as to the channel being "narrow". There is no question that the "Ada Warren" violated the custom of up-river boats to hug the south shore.

Miller says (p. 68) that at this point:

"The towboat blew one whistle. I stepped on the lower boxes and looked over the boxes."

The "Ada Warren's" answer (p. 22), sworn to on the statement of her pilot, describes the scene at this time as follows:

"* * * a red light was seen a little to starboard by those in charge of and navigating said tug, which red light proved to be the port light of the steamship 'Meteor', coming down the stream at a considerable

rate of speed. The tug 'Ada Warren' *thereupon blew one whistle* to indicate her intention to go to the *starboard* of said approaching vessel and ported her helm. That in the moment when said signal was given and said manoeuvre executed, it appeared to those in charge of the tug that but for said manoeuvre the fast approaching vessel of large size would strike the tug or her barge amidship and probably sink them or one of them."

As the "Ada Warren" had the "Meteor" on her starboard side, it was her duty to keep out of the "Meteor's" way, according to article 19 of the rules, which reads as follows:

"Art. 10. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

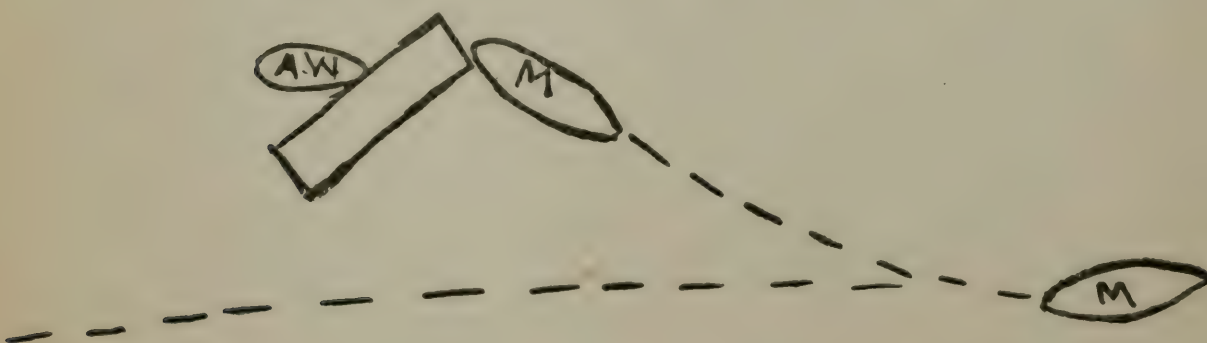
It is thus apparent that if, "in the moment" the "Ada Warren" blew the one-whistle signal, her commander knew the exact place the approaching vessel would ram them, i.e., admidships, the "Meteor" must have been fairly close and *the tug and tow must have been crossing her bows*, thus violating article 22, which reads as follows:

"Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

That the "Ada Warren" was well across the bows of the "Meteor" and on her starboard side, is apparent from the fact that the tug's pilot, through her

answer, says that when he blew his whistle he intended "to go to the starboard of the said approaching vessel". This was his proper manoeuvre only if he were on the "Meteor's" starboard side. Unfortunately, the "Ada Warren" "ported her helm", the answer tells us, which would throw her to her own starboard side and toward the *port* side of the "Meteor"; that is, back again across her bows.

A further evidence that the "Ada Warren" was across the "Meteor's" bows and on the "Meteor's" starboard side, is Miller's testimony that the "Meteor" was turning to starboard (p. 70) just before the collision and in spite of this the *starboard corner* of the barge rammed the "Meteor" just *under her bow* on the port side. As the blow was at the "Meteor's" bow and the "Meteor" had been turning toward the starboard, the "Ada Warren" must have been on the "Meteor's" starboard side before she began to turn. This is apparent from the following diagram.



M-M "Meteor" turning to starboard is struck at bow by starboard corner of barge. The latter must have been on "Meteor's" starboard side before "Meteor" turned.

Miller's testimony (pp. 70, 71) with regard to this is as follows:

“Q. Let me ask you: When you saw the vessel approaching on your starboard bow, if you had continued on the course you were on, would you have cleared her? If the tug and tow had continued on the course you were on when you saw the vessel on the starboard bow would you have cleared her?

A. Yes, I believe it. He was blowing no whistle—he blew one whistle and the big steamer changed his course and went across us. The barge did not change its course at all. I cannot say that—nothing about that. The big steamer changed and came across.

Mr. DENMAN. Q. As I understand it, at the time that you saw the big steamer coming down the channel the vessels would have cleared if you had kept on your courses? A. Yes, sir.

Q. Was that because the steamer was sufficiently on your starboard bow to clear you?

A. If our towboat only blew two whistles, he would have been all right. The tug only blew one whistle, and that was the cause of the accident; the big steamer run into us.”

As Miller says, “If our towboat blew two whistles he would have been all right”. This would have indicated the exact move which the answer (p. 22) said the “Ada Warren” intended to make, i.e., to pass to the “Meteor’s” starboard. Unfortunately, as the answer tells us, she ported her helm and hence went back across the “Meteor’s” bows toward her port side.

But we are not at an end of the “Ada Warren’s” violations of the rules. The answer claims that she began to reverse full speed astern as soon as she

saw an impending collision (p. 22). Miller tells us that she blew but one whistle (p. 70). We thus find her violating article 28 (requiring three whistles for this manoeuvre, as follows:

“Art. 28. When vessels are in sight of one another a steam vessel under way whose engines are going at full speed astern shall indicate that fact by *three short blasts* on the whistle.

“The Straits of Dover, in the position stated, was the favored vessel, and under article 21, *supra*, was required to keep her course and speed; and, upon failure to understand the course or intention of the Bluefields, should have immediately signified the same by giving several short and rapid blasts, not less than four, of her steam whistle (rule 3, art. 18); **or**, upon reversing her engines and putting the same full speed astern, she should have indicated the fact by three short blasts of her whistle (article 28), so as to warn the Bluefields of her movements.”

The Straits of Dover, 120 Fed. 900 at 904.

It is extremely doubtful that the “Ada Warren” reversed at all, for the following reason. The tug had powerful engines, 250 horse power, and they must have jarred her badly going from full speed ahead to full speed astern. Yet her captain who was sleeping below was not awakened till the actual impact of the vessels (p. 41). It is hard to believe that a sudden reversing movement of her engines would not have awakened him.

We thus see that without the testimony of Captain McFarland and regarding only that of Dick Miller, the passenger, our opponent’s sleeping captain, the sworn averments of the answer and the mute evidence

of the place of the wound in the "Meteor's" bow, Judge De Haven's decree against the "Ada Warren" is amply supported by the proved violations of articles 19, 22, 28. However, the end is not yet. The lights on the barge were improperly placed.

The captain of the tug prepared, and tug's proctor introduced in evidence, a model of the tug and tow on which the positions of the lights are indicated and sworn to (Hammer, p. 32). The model of the barge (Apostles, p. 277) shows the barge alongside the starboard side of the tug, *with a light at each end of the barge amidships*. This arrangement is a flagrant violation of paragraph 7 of rule XI of the United States inspectors, which is as follows:

"Barges or canal boats towed alongside a steam vessel, if on the starboard side of the said steam vessel shall display a white light on her starboard bow. If there be more than one barge or canal boat alongside, the white light shall be displayed from the outboard side of the outside barge or canal boat."

This arrangement fails to comply with the above rule for towing alongside a tug on her starboard side, which provides for but *one* light at *the barge's starboard bow*. Worse than that, it deceptively complies with paragraph 5 of the rule, which provides for towing astern. This paragraph reads as follows:

"Barges and canal boats being towed *astern of steam vessels when towing singly*, or what is known as tandem towing, shall each carry a white light on the bow and a white light on the stern."

It is apparent what our opponent must have really meant when he said he found his pilot untrustworthy. However deficient he may or may not have been in integrity, he certainly was unreliable in such trifling details as the placing of his lights, the two-whistle signal rule, the passing ahead rule, the burdened vessel rule, and the three-whistle reversing rule.

It is submitted that, even if there had been witnesses contradicting Miller, this court would be bound to sustain Judge De Haven's decision. In the absence of all opposing witnesses and with his failure to produce the "Ada Warren's" pilot, lookout, engineer or fireman, it is submitted that the decision must be against her, even if the later cases had not made an appeal on conflicting *viva voce* evidence no longer a trial *de novo*.

Each of these many violations of the statute gives rise to a presumption that it must have contributed to the collision. The burden of proof shifts to the "Ada Warren" to show not only that it was not one of the causes of the collision but that it *could not have been*. In the classic language of *The Pennsylvania* case:

"The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. *In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.* Such a rule is

necessary to enforce obedience to the mandate of the statute.”

The Pennsylvania, 19 Wall. 125; 22 L. Ed. 148.

Or, as stated in *The Martello v. Willey*:

“There can be no doubt”, says that court, “that the ‘Willey’ (a sailing vessel) was guilty of a statutory fault in the failure to provide herself with the foghorn prescribed by the international regulations, and the presumption is that this fault contributed to the collision. This is a presumption which attends every fault connected with the management of the vessel, and every omission to comply with a statutory requirement, or with any regulation deemed essential to good seamanship. In *The Pennsylvania v. Troop*, 19 Wall. 125, it was said that ‘in such a case, the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been’.” The court asked whether it could be said that “the absence of a mechanical foghorn could not by any possibility have contributed to the collision?”, and answered “We think not”.

The Martello v. Willey, 153 U. S. 70.

This rule, sometimes called the “but for” rule, has been more recently laid down in the following Circuit Courts of Appeal: *The Admiral Schley*, 142 Fed. 64 at 67; *Donnell v. Boston Towboat Co.*, 89 Fed. 757 at 762; *Merchants & Miners Co. v. Hopkins*, 188 Fed. 890; *Hawgood Transit Co. v. Messaba SS. Co.*, 166 Fed. 697 at 702; *The Ellis*, 152 Fed. 981.

Can the “Ada Warren”, who has not offered a single eye-witness from her vessel as to the manoeuvres preceding the collision, assert that no one of these proved

violations of the rules *could have* contributed to the collision? Has she shown that the “Ada Warren’s” blast of one signal for the purpose of going to the “Meteor’s” *starboard*, in violation of the Inspectors Rules, *could not* have contributed to the collision? Can she say that her crossing the bows of the opposing vessel, which was on her *starboard* side and showing her a red light, in violation of article 19 and of article 22, *could not* have contributed to the collision? Has she shown that her return from the *starboard* side of the “Meteor’s” bows across to the port again, violating articles 19 and 22, *could not* have contributed to the collision? Has she shown that the failure to blow three blasts at the time she was reversing, in violation of article 28, or alternately, that she neither reversed nor blew three blasts, *could not* have contributed to the collision? Has she shown that the deceitful placing of the lights on the barge, in violation of paragraphs 5 and 7 of rule 11 of the United States Inspectors, *could not* have helped in causing confusion in the opposing captain’s mind and hence *could not* have contributed to the collision?

And what must we say when all of these presumptions against the “Ada Warren” are coupled with the presumption arising from her failure to produce any witness that was on her at the time of the collision, barring the sleeping captain, although her pilot, lookout, engineer and fireman each would have had pertinent testimony on some one or another of the above proven violations, if there had been any excuse or explanation or palliation for them? We submit that the “Ada

Warren's'' case was made out by the admissions of the pleadings, and the undisputed facts in the testimony of Miller beyond the peradventure of a doubt.

**CAPTAIN McFARLAND'S TESTIMONY SUPPORTS THE CASE
MADE OUT BY THE ANSWER AND THE DISINTERESTED
WITNESS FROM THE "ADA WARREN".**

We have before clearly shown, without Captain McFarland's testimony, that the "Ada Warren" violated the rules in as many respects as she could in the short space of the passing drama. We will now demonstrate that McFarland's deposition as to what occurred; corroborates in all respects the case made out by our opponent's pleading and the passenger Miller.

It is undisputed that the tide was flooding, two hours gone, and hence that the "Meteor" was "bucking" the heaviest inrush of waters from San Pablo Bay. As Captain Hammer says, all the waters of San Pablo Bay were forced with great power into the Carquinez Straits as in a funnel (p. 35), thence on into Suisun Bay and the Sacramento and San Joaquin basins. Captain Hammer does not say at what speed the water flows, but we may safely presume, from the volume of waters and the forces described, that the tidal rate is about five or six miles an hour. A court of admiralty will take judicial notice of the fact that the tides flow there at great speed, and no observant person, who has travelled between San Francisco and Sacramento, can regard five miles an hour as an excessive estimate of the flood tide rate in the narrows.

The "Meteor's" speed through the waters was about eight knots, which, against a five knot tide, would find her passing the rocky headlands of the straits at not over three knots an hour. A slower rate of speed would have been most unsafe in view of the headlands and shifting shallows on the north shore (Hammer, 48). What would have happened to her, had the steamer slowed down to less than the tidal rate is apparent from what happened to the barge which, when it broke loose, after the collision, was in fact carried onto the rocks on the north shore (Miller, pp. 74, 75).

Having left the ore bunkers at Crockett, McFarland was proceeding down stream on the northerly side of the channel, when he saw the green light of the "Ada Warren" on his port bow, thus indicating that the "Ada Warren" was on a crossing course going towards the northerly shore of the straits.

This exactly accords with the "Ada Warren's" pilot's description in her answer, which says that when she was entering the straits from San Pablo Bay, she saw the "Meteor's" red light on her starboard (green light) side (p. 22).

McFarland then says that the "Ada Warren's" green light crossed his bow to starboard half a point, as if going to Vallejo on the north shore. This agrees with Miller, who says she proceeded nearer the northerly shore, that is the Vallejo side.

McFarland says that when the "Ada Warren" had crossed his bows from port to starboard, she blew one whistle and showed both lights, indicating that she had

ported her helm and was coming straight for him. This is corroborated by the testimony of Miller, who says that the "Meteor" struck the "Ada Warren" only after the "Meteor" turned to her starboard, that is to say, the "Ada Warren" must have been on the "Meteor's" starboard side before the latter began to turn in response to the one whistle signal.

This also agrees with the allegation of the answer, which says that the tug "Ada Warren" blew one whistle and ported her helm, and "that in the moment when the said signal was given and said manoeuvre executed, it appeared to those in charge of the tug that but for the said manoeuvre the fast approaching vessel, of large size, would strike the tug or her barge *amidships*, and probably sink them or one of them" (p. 22). It is apparent that the "Meteor" could have appeared to threaten this danger only if she had gotten in front of the "Ada Warren" and shown her two lights. It also appears that they could not have been approaching head on, as the "Meteor" threatened to strike the barge *amidships*.

Captain McFarland says that if the "Ada Warren", being on his starboard side and showing her green light, had continued on her course without changing, they would have passed clear of one another (pp. 92, 93). This is corroborated by Miller, who says the same thing (pp. 70, 71).

Although the tug and tow, on showing their red and green lights to the "Meteor", appeared to be coming straight on, they were in fact still passing to the

“Meteor’s” starboard. This is evidenced by the fact that the tug and tow were lashed together at such an angle that they proceeded through the water on a course to the left or port side of the “Ada Warren”. Captain Hammer, who lashed the vessels together, drew a model of them as they were that night, which model was drawn to angle and scale. He describes them as follows:

“Q. Kindly tell the court what this model represents (pointing)?

A. This represents the barge, the light at each end, and the relative position of the tug alongside her with her lights, the red and green lights and two towing lights (pp. 31, 32).

MR. DENMAN. Q. You have drawn this to scale and angle, have you not?

A. Yes, sir, practically” (p. 51).

The model shows that the two are lashed together at an angle of about 25° (p. 277). Captain Hammer says that the combination of tug and tow would proceed ahead through the waters at about the “break between the angle” (p. 51). That is to say the actual course through the water would be $12\frac{1}{2}^{\circ}$ to the left or port of the median line of the “Ada Warren”, and hence, as Captain McFarland looked into the lights which appeared to be coming straight on, the combination was in fact moving to his starboard.

Captain McFarland then says that he put his helm to port, thus turning his vessel to his starboard, away from the approaching two lights, and thereupon reversed his propeller full speed which would have the effect of turning her even more sharply to starboard, as she went forward under diminishing speed (p. 92).

This manoeuvre is corroborated by the testimony of Miller, who says that the "Meteor" turned to her starboard at the moment before the collision (p. 70).

The manoeuvre is also corroborated by the pleadings, Article VI of our libel alleging:

"That when the captain of said steamship 'Meteor' saw that a collision was about to occur, and at the time that said tug 'Ada Warren' changed her course, said captain of said steamship went to starboard and started his vessel full speed astern, at the same time blowing three whistles."

The pilot of the "Ada Warren" must have seen whether the "Meteor" "went to starboard", as alleged, and heard whether she "blew three whistles", as alleged. The answer, which was verified on his description of the collision, instead of denying these allegations directly, avers that it has not sufficient information to deny them and denies on that ground. This, of course, cannot put at issue the facts as to the turning of the opposite steamer and the blowing of her three whistles, of which the pilot and the opposing vessel could not have been ignorant.

It is submitted that in porting his helm and in reversing full speed when he saw the lights of the "Ada Warren", apparently coming straight for him, after her green light had crossed his bow, Captain McFarland properly obeyed the universal rule imposed upon steam vessels apprehending a collision. That this was good judgment, in view of the fact that he had a right hand propeller which cumulated with the port helm to throw him to starboard and pass the oncoming two lights

of the "Ada Warren", cannot be doubted. That the two lights did not truly indicate the course of the "Ada Warren", and that she herself was proceeding toward the "Meteor's" starboard, and hence contributing in causing the collision, is no fault of Captain McFarland. Even granted that with the misplacement of the white lights on the barge, which indicated that the barge was astern and not alongside, the "Meteor's" captain guessed that the two vessels were lashed together, it would be impossible for him to tell in the darkness on which side the tug, with her lights, was lashed and toward which side was the variant if any between the true course and the lights. He had a right to presume that the lights were so arranged that they told the truth.

In the absence of any motion in the lower court or here to reopen the case and introduce the alleged affidavit of Captain McFarland, we must accept his statements with full credit as to their correctness. We submit that, even if the contradictory affidavit were in evidence and McFarland had been given his chance and failed to explain the contradiction, nevertheless, the description given in his deposition is so inherently probable, in view of the undisputed facts and the testimony of unbiased witnesses, that it should be accepted as correct.

Here it might be well to consider the suggestion that Captain McFarland was in fault because he did not have a licensed pilot on board. There is no law requiring him to take a licensed pilot. Congress does not require the use of a federal pilot in these inland waters

(*Anderson v. Pacific Coast SS. Co.*, 225 U. S. 186); and there is no law in the State of California requiring a state pilot. As a matter of fact, the laws of the State of California provide but two state pilots for all of the huge traffic between San Francisco Bay and the Sacramento and San Joaquin basin, a traffic carried on by dozens of vessels, many coming from the ports of other states and foreign countries.

And the reason is obvious. Carquinez Straits from Crockett out into San Pablo Bay, are a straight shoot for two miles which, aside from the one shoal on the northerly shore, where the straits are nearly a mile wide, present no difficulties to navigators, other than the obvious one to any mariner, viz.: the ebb and flow of the tide.

However, whatever difficulties may exist under certain circumstances, there is not even a suggestion in any portion of this case that after the two vessels came within manoeuvring distance, any peculiarity of water or shore in the slightest way hindered or impeded their movements. Even if McFarland had been on his first voyage through the straits and entirely ignorant of real dangers existing there, that ignorance would not have any place in the chain of causation leading to the collision. From the time the "Ada Warren" blew the first passing whistle, as alleged in the answer to the libel, to the time of the collision, the manoeuvres of the two vessels would be exactly the same if they were in the open sea. This is apparent from the pleadings themselves. Neither the libel nor the answer alleges

that either vessel was at fault as to any special condition imposed by the width of the channel or by reason of any ignorance of the peculiar conditions of the locality. Both libel and answer rely entirely on alleged errors in non-observance of those general rules of the road in force in open and unrestricted waters.

However, Captain McFarland was not wanting in familiarity with the neighborhood, as is shown by his actions in this case. It appears that after the collision the "Meteor" was headed directly on the north shore (p. 88). She had then stopped and, without headway to steer with, she was drifting, side on, to the rocky shore at the first highland, to which the barge did in fact float (Miller, p. 74). The water extended to the north over the mud flats for more than three ship's lengths, and one unfamiliar with the presence of these shoals would have gone ahead in attempting to turn the vessel to bring her around to her course, and have been pulled on by the north shore cross-current and stranded. Instead, McFarland recognized the danger of the north shore current pulling him on the flats and the general trend of the waters toward the first highland, and *backed* and *filled* till he had brought his vessel around, and *then rescued the tug*, which, through the negligence of her owners, was not supplied with an anchor (McFarland, pp. 88, 89), and was drifting helpless. They were finally anchored at midstream after the "Meteor" had towed the "Warren" a quarter of a mile from her dangerous position.

McFarland's skill was no doubt due in part to his experience as a pilot on the Yukon River and the Puget

Sound waters (p. 80). He testified that he was familiar with the Carquinez Straits, and had made several voyages there (p. 81). It is not shown that there were any conditions to be met with in the straits which an experienced river pilot could not overcome after several voyages and with the aid of the usual charts.

As the tug's captain said (Hammer, p. 36), "If he did not know the place, he would be apt to get into trouble". Every act of the "Meteor's" captain showed that he knew the natural conditions, and he did not "get into trouble" with any of them. In fact he rescued the tug from impending "trouble" with the north shore rocks.

In opposition to this affirmative showing of skill and knowledge "proved by the trial and the event", the tug's proctor would show him unfamiliar with these waters, because he did not know the compass relationship of Port Costa to the Carquinez Straits. The fact is that his answer is correct. When we recollect that in a strait or river channel a pilot ceases to travel by the compass and navigates by shoreline and headland, the triviality of the incident becomes apparent.

It also appears that the "Meteor's" libel, as drafted, said that the vessel was proceeding down San Francisco Bay, instead of mentioning the particular branch or arm of the bay. It is true that the "Meteor" was going to Point Richmond in San Francisco Bay, but the tug's proctor will have it that, because his proctor drew the libel in this form, McFarland thought that Carquinez Straits were a part of the Bay of San Francisco, though

he had made several trips up the straits and had splendidly shown his knowledge of the waters in his handling of his vessel. It is not by such casuistry that a sailor's competency is disproved.

CONSIDERATION OF THE ALLEGED FAULTS OF THE "METEOR".

We now take up seriatim the alleged faults of the "Meteor" as appearing in appellant's brief, on pages 29-44.

1. The master was not competent to navigate in the difficult waters in which the collision occurred.

The question of the captain's competency we have dealt with in the last chapter. The law did not require him to take a licensed pilot. McFarland himself was an old river pilot, on the Yukon and Puget Sound waters. He had made several trips through Carquinez Straits and proved by his subsequent manoeuvres after the collision when he rescued the tug that he was familiar with all of the conditions at the point of collision.

2. The "Meteor" navigated as if she had the right of way. As a matter of fact the tug and tow had the right of way.

We are unable to comprehend how counsel, in view of the sworn allegations of his own pleadings, has the temerity to set forth the argument appearing on pages 31-35 of his brief. It is, in substance, that although under ordinary conditions the "Meteor" would have the right of way, in this case, owing to the fact that the tug

had a tow alongside, the privilege shifted to her and she was entitled to keep her course and speed while it became the duty of the "Meteor" to keep out of her way.

We will later consider the authorities on which this theory is claimed to rest. For the moment it is enough to note that our opponent concedes that it is a relative matter. That if the tow impedes the tug very little, the obligation does not shift and they must bear the burden of getting out of the way of an opposing vessel when the ordinary rules impose that burden on them. How an opposing vessel is to know on a dark night the exact point of incumbrance where the burden shifts is not explained by our opponent.

In this case the pleadings of both parties show that under the regular rules of the road the "Meteor" was the privileged vessel. Our opponents answer states the situation when the vessels first began to manoeuvre as follows:

* * * "a red light was seen a little to starboard by those in charge of and navigating said tug which said light proved to be the port light of the "Meteor" coming down stream at a considerable rate of speed" (p. 22).

That is to say the vessels were on crossing courses under article 16, rule I, as the "Ada Warren" could see but one (red) light on the "Meteor". And as the "Meteor" was on her starboard side the "Ada Warren" had the duty of keeping out of the way and the "Meteor" the privilege of keeping her course and speed under article 19 as follows:

Art. 19. When two steam vessels are crossing so as to involve risk of collision, the vessel having the other on her starboard side shall keep out of the way of the other.

Now the question whether the “Ada Warren”, a powerful tug of two hundred and fifty horsepower, seventy-five feet long, that is over half as long as her tow lashed alongside, was sufficiently incumbered to shift the burden to the “Meteor” necessarily *is one of which her pilot is the best judge*. Surely if he did not think that the burden had shifted no one else was called upon to do so.

Now the “Ada Warren’s” pleadings, sworn to on Pilot Odon’s statements, frankly admit that he claimed the burden of getting out of the way and indicated to the “Meteor” by a one blast whistle that he intended to do so and actually did port his helm as the first move to accomplish that end. This appears at two places in the answer, first in Article II (p. 20), where it “denies that said collision would not have occurred if the persons navigating said tug had signified their intention to pass on the port side of said “Meteor” in proper time, but in this behalf claimant says that said intention was signified *by said tug to said “Meteor” in proper time and according to the rules of the road*” and second on page 22, where, after alleging that it saw the “Meteor’s” red light to starboard, says:

“The tug thereupon blew one whistle to indicate her intention to go to the starboard of the approaching vessel and *ported her helm.*”

We submit that with his pleading, in such a condition, even abuse of his opponent is a wiser course for his case than such an argument as is offered.

If our opponent's contention be correct, namely, that the "Ada Warren" had become the privileged vessel, then she was in admitted violation of the rule that she must keep her course and speed.

Art. 21. Where by any of these rules one of the two vessels is to keep out of the way, the other shall keep her course and speed.

We thus have the "Ada Warren" hanging either on the Scylla of announcing that she was not the privileged vessel and unsuccessfully assuming the burden of keeping out of the way or the Charybdis of having failed to keep her course and speed as a privileged vessel.

We have before pointed out that the witness Miller corroborates our opponent's answer and says that the "Ada Warren" blew the first whistle. Neither Odon nor the lookout were produced by the "Warren's" proctor to contradict his pleading.

2b. *Consideration of authorities as to shifting of burden where a vessel is towing.*

What we have above said disposes of the necessity of considering the authorities cited by our opponent, but it is nevertheless interesting to note that in everyone of those cases the tug was encumbered, not by a single barge alongside and hence easily manageable, but by barges *on hawsers trailing behind* and seriously complicating the navigation of the tug. All these are sufficient

distinctions, but there is yet a more important one. *In no one of these cases has the tug and tow deliberately attempted crossing the course of the steamer, passing from her port to starboard so as to impose on the steamer the obligation to keep its course and speed.* All these cases stand for is the proposition that other things being equal, i.e., no passing rule having been invoked by the tug and tow placing a duty on the steamer (such as to keep her course and speed under Rule II), it is the duty of the steamer to alter its course and speed to keep out of their way.

In *The Jamestown*, 114 Fed. 593, cited in the tug's brief, the District Court held the steamer liable for maintaining a speed of fifteen knots in Elizabeth River, *and the tow liable for being on the wrong side of the river.* There is no suggestion that the tug was attempting to cross the course of the steamer and hence as here imposing on the steamer the duty to keep her course and speed. The decision is that long before the vessels got close enough to maneuver, the steamer should have slowed down from her fifteen miles. Here we have shown that we were going at about eight miles over water, and but three miles past land.

In *The Georgetown*, 135 Fed. 854, a District Court decision, also cited, it nowhere appears that the tug was so maneuvering as to impose on the steamer the duty to keep her course and speed, nor is there any evidence that the steamer was in any way encumbered. The tug was encumbered by *the tow on a long hawser*, and between the unencumbered steamer and the bur-

dened tug the former was held liable. It is difficult to see why the tug's brief cites this case.

In *The Lucy*, 74 Fed. 572, the tug was encumbered with a tow of *seven vessels*—five barges and two schooners. The steamer was unencumbered. No act of the tow placed a burden on the steamer to keep her course and speed, and she was held liable for not keeping out of the way. The tug's proctor does not explain the applicability of this case to the "Meteor", upon whom the "Ada Warren" had imposed the duty under article 21 of keeping her course and speed.

In *The Syracuse*, 9 Wall. 672, three tugs—one with two tows, one on each side, one with nine tows trailing behind, and another towing something not disclosed—were passing ahead in a narrow stream, when the steamer dashed in among them at the speed of *seventeen miles* an hour, and the collision occurred. It is manifest that the rate of speed was an outrageous one to approach these ten or twelve vessels in a narrow channel. It is manifest also that it was impossible that any duty to keep her course and speed could have been imposed on the unencumbered steamer in this situation, as no passing rule had been or could be devised to meet such an emergency. As with the other cases, we cannot see how this throws any light on the "Meteor", who was going at less than half the speed of the "Van Winkle" in the *Syracuse* case, and had imposed on her the duty of keeping her course and speed.

However, in *The George S. Schultz*, 84 Fed. 508, the Circuit Court of Appeals squarely sustains our contention against the tug in a case much stronger for the tug than ours. In that case the steamer had the wide end of the funnel, and was going at fourteen knots, while the tug had her tow on a hawser and her maneuvering was impeded by the narrow end of the channel. The tug attempted to cross the path of the steamer from port to starboard, as with us, and failed to keep out of the way. The court says, p. 509:

“That the ‘Schultz’ was grossly in fault is manifest from her own evidence, and upon that from her tow. They were on crossing courses, and the ‘Schultz’ (tug) had the ‘Little Silver’ on her starboard hand at the time when it became necessary for them to navigate according to the regulations if they were to avoid risk of collision. * * *

“Counsel further contends that ‘fault is not chargeable against a vessel for having another on her own starboard hand’. That is true enough, but she is in fault if she does not navigate in accordance with the regulations governing the movements of vessels thus placed. Rule 19 of section 4233 of the United States Revised Statutes provides: ‘If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other’. That rule has since its first enactment been in full force in harbors, rivers, and inland waters. The acts of March 3, 1885, and August 19, 1890, did not affect its application in such locality; and the act of February 19, 1895, expressly re-enacted it. Rule 23 of the same section (4233) equally applicable, provides that ‘where, by rule * * * 19, * * * one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule 24’, which

provides for special circumstances. It might be supposed that, after all the years which have elapsed since their passage, the application of these two rules would be the very A B C of practical navigation. The burdened vessel is to 'keep out of the way'. How it shall do so is not prescribed. It may, of course, turn to starboard sufficiently to allow the privileged vessel to pass, and then proceed under the stern of that vessel. This is the path of safety. It may 'keep out of the way' by crossing the bows of the privileged vessel, but, in undertaking this maneuver, it is chargeable with the knowledge that the other vessel is by express rule required to keep her course. Unless, then, the burdened vessel has time and space thus to cross in safety without the help of the privileged vessel, prudent navigation would forbid her making such attempt. If she makes the attempt, and thereby brings about collision, she is in fault for not keeping out of the way of the privileged vessel. The inspectors' rules give her the opportunity of agreeing with the privileged vessel that this usually risky maneuver shall be attempted, and that the privileged vessel will co-operate to that end. *Such agreement would constitute a special circumstance, within the meaning of rule 24.* This agreement is effected when the burdened vessel's signal indicating an intention to cross in front of the privileged vessel is accepted by a corresponding signal from the privileged vessel. But the burdened vessel which without such agreement undertakes to navigate as if she had the privilege, and the other the burden, assumes all responsibility for the consequences resulting from such failure to conform to regulations. All this has been explained in the opinions of the courts over and over again. It is sufficient here to refer to the decision of this court in *The John King*. 1 C. C. A. 319, 49 Fed. 469.

"It is a fair inference, however, from the testimony in the different collision records that come

before this court, that the practice is not uncommon among masters of steam vessels in these waters to navigate in utter disregard of any burden imposed upon them by rule 19. In some cases it seems to be assumed, *wholly without authority*, that a tug which has a tow is always privileged, no matter what her position."

* * * * *

"Excuse should be difficult for any master, who with full knowledge that he is the one who under the rules should change his course or speed or both, begins his navigation in the presence of approaching risk of collision by insisting the other vessel shall make such changes."

The court with expressed reluctance holds the steamer also liable, because, after the tug and tow had brought about the collision *the steamer failed to reverse her screw*. In our case the "Meteor" did reverse, and had almost stopped at the moment of the impact.

This case of "The Schultz" is the only one on behalf of the "Meteor" that we ask the court to inspect. We submit that its careful perusal would have necessitated a decision in favor of the steamer and against the tug, even if the tug were not convicted under her pleadings.

3. *"The 'Meteor' navigated improperly by relying on the theory of 'crossing vessels' when in fact, the rule of crossing vessels did not apply to the situation."*

Here again do we find counsel, who has not produced a single eyewitness, asking the court to ignore the solemn averments of his pleadings. These averments contained the account of the collision by the "Ada

Warren's" captain and pilot, and were amended at the hearing some fourteen months after the accident, thus presenting counsel's theory of the case at the very moment of its submission to Judge De Haven.

These allegations, to which we have so often had occasion to refer, exactly describe the vessels as on crossing courses within the very words of the inspectors' rules. They state (p. 22) that the "Ada Warren" had the "Meteor's" red light on her starboard bow as the two vessels approached, and the "Meteor" was "*coming down the stream*".

This being the case, the "Ada Warren" must *ex* necessity have been pursuing a diagonal course across the stream and across the "Meteor's" bow, and hence that risk of collision existed.

It is not necessary however even to plot this for our opponent's pleading then tells us that the "Ada Warren's" pilot blew one whistle to pass to the "Meteor's" starboard (*sic*), and "that in the moment when the said signal was given and the said maneuver executed it appeared to those in charge of the tug that but for said maneuver the fast approaching vessel of large size *would strike the tug or her barge amidships and probably sink one or both of them.*"

Leaving aside the confession of crude ignorance by the "Ada Warren's" pilot in blowing one whistle and porting his helm to enable him to pass on the other vessel's *starboard* side, what does this statement do to counsel's suggestion that when the "Ada Warren" blew her first signal there was no danger of collision.

Of course Miller's testimony shows that the "Ada Warren" had passed the "Meteor's" bow and was on her starboard side. It was therefore quite proper for her pilot to desire to pass on the starboard side of the "Meteor" as he says in the answer he desired to do. The trouble is that he neither gave the right signal nor executed the right maneuver. He should have blown two whistles and starboarded his helm. His pleadings tell us and Miller and McFarland agree that he did the exact contrary.

It is well to note that according to our opponent's pleading the "Ada Warren" though fearing risk of collision did not regard herself as in *extremis* when she blew her one whistle for, as he ^{very} told Hammer (pp. 22, 23), it was not until after a short interval of time when the "Meteor" failed to respond with one whistle and crossed him with two whistles that a collision "*then*" appeared impending and he gave his signal for reversing full speed astern. While it is true that our opponent amended by striking out the allegation as to the cross whistle, the fact remains that his pilot said that it was not till after an interval of time after he blew one whistle that he regarded the collision as impending and requiring him to reverse. The allegation of the answer corroborates McFarland's statement that the "Ada Warren" blew one whistle when they were around two minutes apart. He recognized, however, that the "Ada Warren's" mistaken one whistle would not take her to his starboard side but threw her across his bows so he reversed after indicating by one blast that he had

ported his helm, and that the reversing would take him to his starboard to correspond with the tug's erroneous movement to her starboard.

4. "*The 'Meteor' navigated improperly by approaching too closely at an excessive speed.*"

There is no question that the "Meteor's" speed was but eight knots through the waters. This in itself is a moderate speed. However taking into consideration that she was bucking a very rapid tide, we find that she could not have been passing the rocky points and shoals of the straits at more than three or four knots at most. As we have pointed out the barge when she broke loose finally landed on one of these rocky points on the north shore, opposite to the direction from which she came, in a few minutes.

The question then arose should she, even if she could in safety, have changed her speed in violation of the rule that requires a vessel seeing another green light on her port bow, that is to say when she is on the approaching steamer's starboard side, to keep her course and speed (articles 19 and 21, Inland Rules, Situation 5 Inspectors Rules). As we have before pointed out the "Ada Warren" did not regard herself as the privileged vessel as she blew the first signal and ported her helm, thus changing her course.

The decision in *The Schultz*, 84 Fed. 508, above cited, holds that the "Meteor" should not have changed her course and speed in any event, *a fortiori* not when the "Ada Warren" assumed the burden by first porting.

However the uncontradicted testimony of Miller and the location of the scars on the two vessels shows that the "Ada Warren" had just crossed the bow of the "Meteor" to her starboard side and would have passed clear had she not ported her helm as admitted in the answer and turned back across the "Meteor's" bow. Clear error under any theory of burden or privilege.

5. *"The 'Meteor' was at fault in not giving the danger signal when the 'Warren' changed her course."*

When the vessels were about 1000 feet apart and the "Ada Warren" just safely across the bow of the "Meteor" she blew one whistle and ported her helm and showed both side lights. This indicated only one thing, i.e., that she was coming straight for the "Meteor". There could be no doubt about her course or intention, no misunderstanding. Under these circumstances there is no room for application of Inspectors Rule III which is based on the following condition:

"III. If when steam vessels are approaching each other, *either vessel fails to understand the course or intention of the other from any cause* the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts not less than four of the steam whistle;"

There being no doubt of the "Ada Warren's" course or intention the "Meteor" did respond to the one whistle with one whistle and *ported her helm* as she should have done. She assisted her starboard movement by reversing which threw her bow to starboard as she advanced under diminishing speed.

The "Meteor" indicated her reversing movement by the three signal blast required by article 28. By these two signals the "Ada Warren's" captain knew exactly what the "Meteor" was doing, and that she was exactly complying with the request that she turn to starboard while reducing her speed as much as possible to ease the inevitable collision indicated by the "Ada Warren's" approaching two side lights. It would have availed the "Ada Warren" nothing to have received a four-blast signal in addition. In fact such a signal from the "Warren" would have indicated an untruth, i.e., that she did not understand the "Ada Warren's" course when it was perfectly obvious.

It is but another fair sample of the candor of our opponent's brief that he cites *The Georgetown*, 135 Fed. 854 at 858, as an authority for the necessity of blowing *four* signals when reversing when that decision is referring to a violation of the *three* signal reversing rule, i.e., article 28, which we have above cited. This is apparent from the portion of the opinion just before that cited by counsel. *The Georgetown* is a District Court case and cites and relies upon a decision of the Circuit Court of Appeals in which the rule is stated as follows:

"The Straits of Dover, in the position stated, was the favored vessel, and under article 21, *supra*, was required to keep her course and speed; and, upon failure to understand the course or intention of the Bluefields, should have immediately signified the same by giving several short and rapid blasts, not less than four, of her steam whistle (rule 3, art. 18); **or**, upon reversing her engines and putting the same full speed astern, she should

have indicated the fact by three short blasts of her whistle (article 28), so as to warn the Bluefields of her movements."

The Straits of Dover, 120 Fed. 900 at 904.

That is to say he must, if he fails to understand, blow four whistles OR, if he reverses blow, three whistles. Now the "Meteor" did not fail to understand but did reverse and did blow three whistles.

6. "*The 'Meteor' was at fault after the red light of the 'Warren' became visible, in assenting to the 'Warren's' signal without carrying her assent into effect.*"

We do not understand on what part of the record appellants' proctor bases this statement. The rules require an opposing vessel on receiving a one whistle signal if it is possible to do so to answer with one whistle and to port her helm and go to starboard.

The answer at first alleged that he gave two blasts instead of one, but this allegation was withdrawn at the hearing. The evidence is uncontradicted that the "Meteor" did port her helm and turn to her starboard (Miller, p. 70 and supra; McFarland, p. 86) and did blow one whistle (p. 86). If the "Ada Warren" had been dead ahead and herself turning to her starboard the collision *could* not have occurred. That it did occur and the bow of the "Meteor" was rammed after she had been going to starboard shows that the "Ada Warren" did not go to starboard but kept on the course to the "Meteor's" starboard which her false side

lights, due to the angular lashing explained heretofore, failed to indicate.

The reversing helped the "Meteor" to starboard. If she had not reversed she would not have turned as much and would have rammed the "Ada Warren" or the barge amidships instead of taking the blow herself, and probably sent ^{down} to the bottom.

In conclusion we submit that the "Ada Warren" committed the violations of the following statutory rules of the road, and has not only failed to show under requirements of *The Pennsylvania* case that they could not have contributed to the collision, but has not even cast a suspicion on the certainty that they did cause it.

1. The "Ada Warren", having the "Meteor" on her starboard side had the duty of keeping out of the way of the "Meteor" and acknowledged that duty by blowing the first whistle and porting her helm when the vessels were a thousand feet apart, ^{but} failed to keep out of the way violating article 19 of the International Rules.

2. The "Ada Warren", having the duty to keep out of the way, crossed the bow of the "Meteor" thus violating article 22.

3 and 4. The "Ada Warren", having just gotten safely across the bow of the "Meteor" and intending to continue on the "Meteor's" starboard, erroneously gave one blast and ported her helm bringing her back across the "Meteor's" bow and towards her

port side, thus violating the Inspectors Rules requiring two blasts and starboarding her helm if intending to pass the "Meteor" to starboard and violating article 22 in again trying to cross the "Meteor's" bow.

5. The "Ada Warren" failed to reverse before the collision or doing so failed to blow three blasts to indicate that she was reversing, thus violating article 28.

6. The "Ada Warren" failed to place a white light on the starboard bow of her barge thus violating Inspectors Rule XI, par. 7, requiring such a light when towing alongside.

7. The "Ada Warren" placed a white light at the bow and stern of the barge thus indicating that the barge was towed astern in violation of the Inspectors Rule XI, par. 5.

REFERENCE FOR DAMAGES.

The question of the amount of damages suffered by the "Meteor" and her demurrage was first thrashed out through a mass of calculations and testimony before the clerk of the court James P. Brown, Esq., and later on elaborate exceptions before Judge De Haven. Judge Brown's report is a model (p. 123).

Our opponents do not claim the evidence is conflicting, merely that it is insufficient. The question then is have we made out a *prima facie* case as to the various items. However, even if it had been conflicting, this court will not examine it further than to see if there is enough to support the masters and Judge

De Haven's agreeing decisions. We have cited the decisions supporting this rule merely repeating here the one particularly applicable to decisions of commissioners on a reference:

"The question is not what the conclusion of this Court should be on the testimony but whether the commissioner's report, sustained as it was, after full argument, by the District Court, was so clearly erroneous as to warrant us in setting it aside. The powers conferred upon a commissioner in admiralty causes are analogous to those of masters in chancery and his findings upon questions of fact depending upon conflicting testimony or upon the credibility of witnesses should not be disturbed unless clearly erroneous."

La Burgoyne (C. C. A.), 144 Fed. 781 at 783.

It will here be noted that it is not only ~~to~~ the question of credibility to which the rule applies but also to a conflict of testimony that is even where the witnesses are not present but their testimony *appears in depositions*.

We will not enter into an elaborate analysis of the testimony but merely show under each head that a strong prima facie case is made out.

CONTRACT PRICE FOR REPAIRS.

The captain testified that the contract for the repairs for the damage from the collision was \$9875. His testimony in full is as follows:

"MR. DENMAN. Q. Captain, your backing of the vessel was for the purpose of avoiding a collision?

A. It was.

Q. And how far was that successful; had you stopped her at all at the time the collision occurred? A. Well, in relation to the way the tug and the scow drifted by after the collision, we were practically stopped.

Q. You were practically stopped then. Your maneuver was then almost successful? A. Yes, sir.

Q. And it seemed to you the best thing to do under the circumstances. A. Yes.

Q. How great were the injuries to your vessel? A. The contract was \$9875, or thereabouts—within a few dollars.

Q. Contract for what? A. Replacing and repairing the bow and damages done.

Q. And that was the cost for repairing it. What were the injuries to the bow? A. There was several plates bent and several of her frames broken.

Q. How near the water mark? A. Above the water mark."

Apostles, p. 106-107.

It must be apparent to any fair-minded reader of this testimony that the injuries referred to were the injuries caused by the collision and that the "damages done" were damages done by the collision just previously referred to.

The collision broke the lashings of the tug and her barge, and the tug shot forward and also struck the steamer's plates (p. 107).

The injury to the "Meteor" was above the water line and she was patched up at San Francisco, where she was delayed two (2) days (Thorndyke, p. 158). As she had a cargo to carry, she was brought to Puget Sound under her own steam, where she delivered a part of her cargo at Tacoma, and the balance at Ever-

ett. She then went to Seattle, the home port of the company, for the repairs (Thorndyke, p. 160).

The vessel was surveyed by Mr. Frank Walker, a marine surveyor, at Seattle and his report introduced in evidence. It showed a very considerable (p. 237) damage to the plates and frames. All of these were damages likely to be inflicted by the corner of the barge and the bow of the tug. Specifications were prepared and bids solicited. There were two responses, and the job was awarded to the lowest bidder, the Standard Boiler Works, and work commenced on her at Seattle on October 23, 1907, twelve days after the accident. At least two days previous must have been consumed in making the survey, preparing the specifications and getting the bids.

The contract price was ninety-eight hundred and seventy-five dollars (\$9875), which was considered fair (Walker, p. 149). Walker's knowledge of the cause of the injuries was based on his interviews with Captain McFarland and the log of the vessel (p. 148). There was no motion to strike out this testimony, and it was therefore open to the consideration of the commissioner.

Struth v. Decker, (Md. 1905) 59 Atl. 727 at 729;
Metropolitan Music Co. v. Shirley, (Minn. 1906)
 108 N. W. 271;

State ex rel. Race v. Cranney, (Wash. 1902) 71
 Pac. 50 at 53.

The receipted bills for the repairs are held to be prima facie evidence of the amount of damage.

The Armonia, C. C. A., 81 Fed. 227;

Beatsburg, 127 Fed. 1005.

It is submitted that this evidence clearly sustains the commissioners and Judge De Haven's decision.

All counsel's speculations as to what might have happened in the twelve days between the collision cannot be considered now. More than a prima facie case was made out and other witnesses should have been brought if it was to be controverted. As to the place of repairs Seattle was the home port of the company and a large seaport where all the repairs for the great Alaska and much of the Asiatic trade is done. Besides the vessel had a cargo to deliver, and she was not called upon to hold up her delivery by delaying at San Francisco because our opponent's ship tortiously rammed her.

II.

Cost of Fairing of Port Bow Anchor.

Expert Walker allowed the sum of thirty-four and 80/100 dollars (\$34.80) as the cost of fairing this anchor (Exhibit C). His knowledge of the source of the injury came from an examination of the vessel and the proximity of the port anchor, immediately next to the injuries to her side, and the nature of the bend in her anchor would be sufficient evidence upon

which to base an opinion that it was caused by the collision. While the reports of the expert and of the adjustment are, in a sense, hearsay, they were admitted in evidence for the purpose of supporting the claim and no objection was taken to the admission, either at the time of the deposition or at the time they were offered in evidence. What we have before said regarding hearsay evidence of this character being sufficient to support a decision, applies here.

III.

Two Days' Demurrage at San Francisco.

The uncontradicted testimony of Mr. Thorndyke is to the effect that the vessel was delayed in San Francisco by reason of the accident for a period of two days, and that she had a full cargo on at that time, to be carried forward for delivery at Puget Sound ports. It also appears that she was hurrying forward, hoping to make another charter between the Puget Sound port and the port of Portland, from which she already had a charter, appearing as an exhibit attached to the report of the commissioner. This, we submit, constitutes a *prima facie* case and, if our opponents desire to show, as they now claim, "that the cost was wholly superfluous and not necessary", they should have brought it out in cross-examination.

IV.

Fifteen Days at Seattle.

This is a mere dispute as to computation of time and Judge Brown's report clearly justifies the 15 days (see next section).

V.

Demurrage.

Judge Brown's report clearly justifies itself by the evidence he cites. We have shown the profits of the vessel for a long time preceding the accident by the production of her trip sheets. We have shown that she was actually under charter for a new voyage at the time of the accident and was on her way to get that charter. We have shown she was delayed seventeen days and that she therefore completed the performance of her charter party seventeen days later than she would have had it not been for the collision. It is submitted that a clearer case of damages could not be made out. The courts always allow damages where a vessel is engaged in the performance of a charterparty and is delayed in accomplishing that performance and, in the absence of other testimony, will allow the amount provided for in the demurrage clause of the charterparty. *The Ravenscourt*, 109 Fed. 660; *Societe, etc. v. Oregon Ry. & Nav. Co.*, 178 Fed. 324. If then Commissioner Brown's finding is to be disregarded, we are entitled to recover the sum of ten dollars (\$10) an hour, the amount provided

for in the charterparty which appears as an exhibit attached to the commissioner's report.

In consideration of all the evidence, Judge Brown decided that the ship lost the first day as well as the last day of the fifteen days during which she was under repairs. The testimony supports this finding, and we believe it should not be disturbed.

VI.

Insurance Premium.

Counsel relies on *The Tremont*, 160 Fed. 1016, which was sustained on appeal in 161 Fed. 2. It does not appear in that case that the insurance was one running on a continuous contract, paid for in advance, of which the ship was losing the benefit during the time she was laid up on demurrage. It does not appear how the profits of the vessel were arrived at; for all that appears in that case, the insurance may not have been deducted from the gross receipts for the purpose of determining the net profit.

In our case, however, it affirmatively appears that the net profit was arrived at by deducting the insurance from the gross receipts. We repeat the language of Judge Brown:

“On the question of insurance, manager Thorn-dyke testified the premiums amounted to \$35. per day, I find from the voyage sheets the rate to have been \$33.85 per day which is allowed. It is a fixed, proper and usual expense that was deducted from gross earnings to ascertain the net earn-

ings here found. The compulsory detention resulting from the collision not only deprived libellant of its net earnings but deprived it of its gross earnings out of which to pay the usual, actual and unavoidable fixed charges and expenses of the vessel. To disallow this expense would be to allow libellant a sum \$575.45 less than its net earnings. It differs from depreciation and maintenance in this case in that it is a fixed unvarying figure. An actual recovery of net earnings would be defeated if the contentions urged by respondent were upheld.”

Apostles, p. 129.

It is apparent that if the court disallows the insurance premium as a separate item, it must lift Judge Brown's estimate of net profits by the same amount and that the result will be the same. In Mr. Roscoe's excellent work on Damages in Maritime Collisions, he treats this subject as follows:

“The earnings of a ship for the purpose of evidence, which is the proper point of view from which to regard them, though in practice, if clearly ascertained, they become something in the nature of a standard, are the net profits of a voyage or voyages near the time of collision—that is, the balance of freight after a deduction of working expenses. It conduces to clearness and simplicity if *neither the cost of insurance* or of management is deducted, because the latter is a mere estimate, and is running on during repairs, and the former is also running on and is strictly not an expense incident to a particular voyage, but a sum which a prudent shipowner deducts from the gains of a particular voyage for the purpose of preventing certain losses. *If deductions are made under these heads, they must be replaced in any calculation as to the amount to be allowed, and added to the net*

amount, just as are the expense of wages, provisions and stores, which are or may be actual out-of-pocket expenses during detention."

Roscoe, Damages in Maritime Collisions, pp. 81-82.

Where the mental process of the commissioner is laid before the court, as in this case, we do not believe that the court will permit the ends of justice to be defeated simply because the arrival at a just decision as to the total is reached by a mental route which differs from that recommended by some other tribunal.

We therefore submit that the final decree must be sustained in all respects.

WILLIAM DENMAN,
DENMAN AND ARNOLD,
Proctors for Appellee.

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No. 2267

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

DANIEL E. MORRIS et al.,

Appellants,

VS.

THE GLOBE NAVIGATION COMPANY,

Appellee.

APPELLANTS' REPLY BRIEF.

The argument of appellee in its brief is chiefly based upon the fact that claimant in the Court below filed an answer, the allegations of which were made on information coming from a source which claimant was afterwards compelled to impeach. Claimant, at the hearing of the case, abandoned this answer. In the light of the new facts shown in the record the principal imperfection in the answer now appears to be the omission, between two allegations, of the statement of a fact which libellant knew to be a fact, but which it had carefully concealed. If libellant had honestly stated in its libel

the important fact which its master had previously sworn to, the defect in the answer would not have occurred.

Apart from this ever recurring argument of appellee—an argument which would be impossible but for the deviation of its chief witness from the straight and narrow path—the brief for appellee contains a rich sprinkling of abuse of opposing counsel. To this feature we do not intend to recur, but leave it to the Court to place it, as an argument on the merits of a collision, on the proper side of the scales.

I. Libelant Rests Its Argument Upon the Answer of the “Warren’s” Pilot, the Affirmative Parts of Which Were Withdrawn.

A. THE ANSWER MAY BE TRUE AS FAR AS IT GOES.

We do not vouch for the truth of any part of the answer, *but* what the answer alleges on the information of the pilot, *may have been the truth.*

He states the following facts:

(1) “That just as she (the ‘Ada Warren’) was nearing a point near the place called ‘Oleum’ and entering the said straits, a red light was seen a little to starboard by those in charge of and navigating said tug, which red light proved to be the port light of the Steamship ‘Meteor’, coming down the stream at a considerable rate of speed.”

(2) “The tug ‘Ada Warren’ thereupon blew one whistle to indicate her intention to go

to the starboard of said approaching vessel, and ported her helm" (Ap., p. 22).

If we accept Captain McFarland's affidavit as the truth, then it appears that, between fact (1) and fact (2), above, another fact occurred, viz., the fact that

The "Meteor" blew one short blast.

This fact the pilot of the "Ada Warren" omitted in the narration given in his answer. This omission of the pilot is explicable without going to the extremity of charging him with an untruth. It is consistent with the assumption that he intended to state what actions *he took*.

Supposing that we had known the fact (so long concealed by the other side) that the "Meteor" blew the first one-blast signal, we could have proved that fact without doing serious violence to the allegations of the answer, by inserting it between the facts therein alleged.

If these vessels met practically end on, as we contend, then the fact that the "Meteor" gave the first whistle would be unimportant; for *either* vessel may give, "as a signal of her intention, one short and distinct blast of the whistle" (Rule IV for Inland Waters). But if we assume the fact, upon which the whole case of the "Meteor" rests, that the "Ada Warren" was about to cross her bow, then the fact that the "Meteor" gave the first one-blast signal is fatal to her case. Even if the construction least favorable to the pilot of the "Ada Warren"

be placed upon his omission to state a fact in his answer (for which we have from the beginning declined all responsibility), his conduct would be less blameworthy than that of the captain of the "Meteor" who, not content with quietly dropping the cardinal fact out of the case, testified positively and repeatedly that he had *not* done what he had previously affirmed under oath he had done (as demonstrated in our opening brief).

B. EVEN IF THE AFFIRMATIVE PARTS OF THE ANSWER ARE UNTRUE IN ANY RESPECT, SUCH PARTS WERE WITHDRAWN.

The answer upon which counsel for appellant builds his argument was expressly disowned by us.

Appellee, on two occasions, makes the statement before this Court that this answer was sworn to by the captain of the "Ada Warren", and draws emphatic inferences from the alleged fact. On page 2 of the "brief for appellee" reference is made, in italics, to "his own answer sworn to by his own captain"; and again on page 3, paragraph 3, the statement is made that "this answer was verified by the 'Ada Warren's' captain." The apostles show that these statements, much relied upon for recrimination, are not true (Ap., p. 23). In truth, the answer was verified by one who knew nothing of the facts, and who says so in his affidavit, expressly declaring that the source of his knowledge is "*information received from the master and pilot of said steamship*".

On pages 5-6 of the "brief for appellee" the following statement is solemnly addressed to this Court:

"The significant part of all this is that the answer was not framed in haste before the facts were known, but *was consciously given its present form, after they had been fully thrashed out before the United States Inspectors.*"

This statement, so solemnly made before this Court, cannot possibly be true, if another statement of fact, made in the same brief, is accepted as true—namely, the statement in paragraph 3, page 3, of "brief for appellee", that

"*After the verification of the answer, and before Captain McFarland's deposition was taken, the United States Inspectors examined into the cause of the wreck, at which the witnesses from both vessels testified*"—

Both statements refer to facts outside of the record; and each was, on that ground alone, improper as a basis for an argument. Is it contended that both are true? The method of building up an argument upon statements of fact which do not appear of record, ordinarily places the opponent in the unfair dilemma of either being dragged into the same impropriety of going out of the record in self-defense, or else suffering the consequences of declining at any cost to be beguiled into an impropriety. In this particular instance we are saved from the unfair dilemma by the fortunate accident that appellee's memory, as to facts, ap-

pears to adapt itself automatically to the requirements of the argument in hand.

The record shows that we had difficulty in ascertaining the facts of this collision. The captain of the tug was not on duty when the collision occurred, and was asleep. His testimony shows that he knew nothing of the facts, except the minor fact of the location of the vessels after the accident. The stipulation attached to the answer (Ap., p. 24) shows that we had difficulty in securing the facts from the only other available source of information, the pilot. We were compelled at the trial to amend the answer by striking out allegations based upon information received from the pilot (Ap., p. 29). We could not call the pilot as a witness, because, as our explanation to the trial Court shows, he was an untrustworthy witness. The record shows that the case was tried on the theory that the facts must be ascertained from the testimony of the witnesses for the "Meteor". We stated to the Court at the trial:

"That is the unfortunate predicament we are in in this case, if your honor please. We shall have to rely entirely, outside of the evidence given by Captain Hammer with reference to the locality and the circumstances surrounding this occurrence, upon the testimony as it appears in the depositions on the other side.

The COURT. Then you rest your case?

Mr. HENGSTLER. We are satisfied that their own testimony shows that the collision was the fault of their side * * * (Ap., p. 59).

It appears, therefore on record, that we, for good grounds, repudiated the pilot as a witness. As the verification of the answer, and Captain Hammer's testimony, show, our information in drawing the answer on file came from the pilot. In repudiating him as a trustworthy witness, we necessarily rejected all the information received from him and, in a substantial sense, abandoned the story of his answer. If our opponents reposed trust in him, it was open to them to accept Judge De Haven's invitation to introduce the evidence given before the inspectors, or they were at liberty to call the pilot as their witness. We had abandoned all reliance on this witness and on the facts received from him before one word of evidence was offered in Court, on either side, as to the facts which led up to the collision, and, as the record clearly shows, Court and counsel had notice that we relied upon the facts as they would appear from the testimony of the "Meteor" to show that the collision "was the fault of their side" (Ap., p. 59). The facts as they were alleged in the libel of the Globe Navigation Company and denied in the answer of Warren Improvement Company, raised the only issues on which the case was tried.

Nevertheless, appellee now bases its whole argument (except those portions which are balanced on the slippery foundation of assumed facts not appearing in the record at all) on the story which we frankly disown.

II. Even if the Answer Had Not Been Withdrawn, Appellants Would Be Permitted, Under the Law, to Prove That the "Meteor" Blew the First Whistle.

It is well settled that, in admiralty, there are no technical rules of *variance*.

In *The Iris*, 13 Fed. Cas. No. 7062, a steamer, with barges lashed to her side, collided with a schooner. The libel on behalf of one of the barges failed to mention the steamer's manœuvre in changing her course, but mentioned only the schooner's fault in keeping *her* course. The schooner's answer alleged that the steamer changed her course. It was urged on behalf of the schooner that there could be no recovery, because the allegations in the libel did not correspond with the proofs. Judge Lowell said:

"I doubt whether * * * there could be said to be a variance between the allegations and the proofs * * * The object to be attained is that the defendant should know what he is called upon to meet, and in arriving at this object, we allow in the first place great latitude of amendment, and in the next we inquire *whether there is in fact surprise in this particular case* rather than whether, on theory, there might be presumed to be such. It has been settled by the highest authority that there is no technical rule of variance in our admiralty practice. *Dupont de Nemours v. Vance*, 19 How. 172, *The Clement*, Case No. 2879."

The case last cited is summarized by Judge Lowell as follows:

“The owners of a brig who *alleged that a schooner caused the collision by changing her course*, recovered damages on *proof that the schooner kept her course* when she should have changed it.”

The criterion is: Can the Globe Navigation Company be surprised by our showing a fact which its captain swore to be true immediately after the fact happened, which fact was then and there recorded in solemn writing and was undoubtedly within the knowledge of the company and its agents on the 12th day of October, 1906, and has been ever since? It cannot be seriously contended that the libelant could now be surprised to learn what it has known from the beginning of this case.

In the *Clement* case, above cited, Judge Curtis said, on appeal, in answer to a contention that a decree in admiralty should be *secundum allegata* as well as *probata*:

“There is an entire class of collision cases, in which the decree is in conformity with the separate allegations of *neither* of the parties. I refer to cases of mutual fault; * * * the court finds part of the allegations in each pleading to be true, and the residue untrue; that the real case is substantially different from the one shown by the allegations of either of the parties * * *”

“I apprehend that, in all collision cases, the court will look at the allegations of both the parties of all matters of fact, upon which fault, or its absence, depends; they will consider, which of those allegations is proved, not allowing either party to contradict by proof, what he has alleged; and having thus extracted

the real case from the whole record, will pronounce for the one party or the other, as that case requires."

The Court also says:

"It must be remembered that the variance occurs, not in describing the substantive cause of action, which is a collision occasioned by neglect; nor in proving the contrary of any allegation; but in detailing the particular circumstances which accompanied or constituted the neglect, *the party has omitted to allege some fact which his adversary supplies* by his allegation on the record."

Thus in the case at bar the worst that can be said is that the answer omitted to allege the fact that the "Meteor" gave the first whistle, which fact our adversary supplies by its evidence.

The Court also remarks that

"it may happen * * * that the very point on which a case of collision hinged had never been touched upon at all in the pleadings."

The answer alleges the fact that the tug "Ada Warren" blew one whistle to indicate her intention to go to starboard; it omits to state the fact that the "Meteor" had already blown a whistle. The reasons why the latter fact was omitted from the pleadings are: First, that respondent was dependent upon unreliable information; second, because the libelant failed to allege in its libel or otherwise disclose a fact material to its case and known to libelant, and which libelant knew to be fatal to its alleged cause of libel.

It is submitted that the claimant cannot be fairly blamed for omitting to state a fact which libelant carefully concealed from it. It would clearly be placing a premium upon the deliberate suppression of truth to sanction the contention that we are too late in discovering it because libelant succeeded so long in concealing it. The principle applies which the Supreme Court declared in the case of

The Steamer Syracuse, 12 Wall. 167,

in the following language:

“It is objected that the libel does not specifically charge this antecedent negligence as a fault. This is true, and the libel is defective on that account, but in admiralty an omission to state some facts which prove to be material, but *which cannot have occasioned any surprise to the opposite party*, will not be allowed to work any injury to the libelant, if the Court can see there was no design on his part in omitting to state them. There is no doctrine of mere technical variance in the admiralty, and subject to the rule above stated, it is *the duty of the Court to extract the real case from the whole record*, and decide accordingly.”

Adapting the syllabus No. 2 of the latter case to the case at bar by reversing the parties libelant and claimant, the case holds that:

Though an answer in admiralty may not allege the specific sort of negligence by which the collision was brought about, but on the contrary allege facts not shown, yet *where the true cause of the collision is disclosed by the libelant's witnesses, so that the libelant cannot allege surprise*, this

Court, if it can see that the omission to state the true cause was without any design, will not allow it to work injury to the respondent; and *though the respondent ought in such a case to have amended his answer below, will extract the real case from the whole record, and decide accordingly.*

The only valid objection that appellee could now raise to the evidence in the record is that the evidence causes it surprise. How could this be claimed successfully where it appears that the new facts are disclosed by its own witness and that these facts were known to it from the beginning of the case? Can it be seriously maintained that libelant is placed in a position of disadvantage by the inadvertent appearance of the truth in the face of a confident expectation that it would remain forever hidden?

III. This Court Should Finally Dispose of This Case.

Appellee contends that appellant, after discovering what appellant had long known to be the true story of the collision, should have made a motion for a new trial in the lower Court, "and failing to move for a rehearing in the lower Court, is not in a position to ask this Court to consider the affidavit" (brief for appellee, p. 6). The reason given by appellee for this contention is that this witness should be given "*a chance to explain it*" (*ibid*, pp. 2, 28).

We respectfully ask the Court to place the master's affidavit side by side with the master's deposition, and decide, if either, in the light of the other, can be "*explained*" except by the irresistible conclusion that, either on the one occasion or on the other, plain perjury was committed. There is nothing to explain, except possibly the immaterial question, on which of these two occasions the witness perverted the truth. We maintain that this question is entirely immaterial; for, if this witness falsified the truth in his deposition, we move the Court to reject it in toto; but, if the witness swore in his affidavit, immediately after the collision, something to be a fact which some months later, in his deposition, he swore not to be a fact, we are still justified in moving the Court to reject his testimony in accordance with the maxim: *Falsus in uno, falsus in omnibus*.

That this Court is justified in considering testimony in all cases where a good excuse for not offering it in the trial Court is given, and where substantial justice requires its admission and consideration in the appellate tribunal, admits of no doubt either on principle or authority. The Courts have admitted it even where no perfectly satisfactory excuse was given for not taking the testimony in the lower Court.

In *Red River Line v. Cheatham*, 60 Fed. 520 (C. C. A. 5th Circ.) the Circuit Court said:

"We are not satisfied that a perfectly satisfactory excuse is given by appellant for not

taking the testimony in question in the lower Court * * *, but we are of opinion that *substantial justice requires the admission of the testimony in this Court*, under all the circumstances of the case. * * *”

In *The Lisbonese*, 53 Fed. 293 (C. C. A., 2nd Circ.), in a collision case involving the conduct of a vessel there were offered in evidence as new proofs, on appeal, the records of the Consulate, containing statements made by the master in the course of an examination before a consular officer, a copy of which record had been served upon the opposite party as the *master's protest*. It was *held* that the record was admissible as to the master's statements following *The Potomac*, 8 Wall. 590).

In the case last cited it appears that a copy of the protest mentioned (of the master of respondent's steamer) “was in the hands of proctor and counsel of the libelant *before the trial in the District Court*” (50 Fed. 105); and “no reason was shown or attempted to be shown, either on the record or otherwise, why these supposed matters of evidence were not produced at the trial in the Court below” (*ibid*, p. 105). Nevertheless, the protest was admitted in evidence. The case at bar is far stronger; for here the affidavit, as part of libelant's exhibit “A” (Ap., p. 222), the latter being part of the deposition of Frank Walker, was not offered in evidence by appellee until October 28, 1911 (Ap., p. 140), more than three years and eight months after the trial of the cause in the

lower Court. The affidavit with its information being in the exclusive possession of our opponent could not possibly be discovered by us before that time. While it is true that, after that time, it was *possible* to discover the new evidence contained in it by analyzing it carefully, yet there was no *reason* for examining it on the question of damages.

It is respectfully submitted that this Court is in the best position to give full relief in the light of all the facts presented to it, and that substantial justice clearly requires that the libelant's case should be judged by the evidence introduced by its witnesses at the present stage of the case.

IV. Miller's Testimony Supports Appellants' Case.

A. This witness does not testify that the "*Ada Warren*" blew the first whistle. His evidence is consistent with the statement of the "*Meteor's*" captain, sworn to when the facts were fresh in his mind, that the "*Meteor*" blew the first whistle. Miller says: First, "I was in the towboat, and I went over to the barge"; second, "The towboat blew one whistle"; third; "I stepped on the lower boxes and looked over the boxes" (p. 68). Again he says: "That is all I *noticed*, one whistle that *they* blew" (p. 69). Whether this indicates that he did not notice the "*Meteor's*" whistle, although it may have been blown, or whether "the one

whistle that *they* blew” means one whistle which each of them blew, does not appear.

B. It does appear, however, that, after he had heard “one whistle that they blew”, “I came down again” from the top of the boxes, “and think everything was all right”. Libellant qualified his witness as a seaman of vast experience. It is submitted that, considering his alleged nautical experience, the fact that, after his survey of the circumstances, he came to the conclusion that “everything was all right” shows conclusively that the “Meteor” also had blown one whistle; that the one whistle exchange was the manœuvre that appealed to him as the proper one under the circumstances, and that the “Meteor” was not on the starboard bow of the “Ada Warren”, but approaching head on, or practically so. After this he goes on to say:

“I took a tumble to myself that there might be a mistake, and I went outside the boxes on the starboard side, and I looked to see where the steamer was, and *there came the steamer right across the channel*, that big steamer. It *came* right across. I think I says ‘*He run into us*’. I jumped on board of the tow and it throwed me down on deck” (p. 69).

He also testifies that the “Meteor”

“turned to her starboard side” (p. 70). “The big steamer went across us * * *” (p. 70).

Again he says:

“*The barge did not change its course at all. I cannot say that—nothing about that. The big steamer changed and came across*” (p. 71).

This testimony shows that, when the witness came down from the box on the barge, he had a feeling of security about the action of the two vessels and the impression that their signals and movements, up to this time, were in order. This feeling of security, and this impression that the vessels had acted regularly, *continued*; otherwise he would certainly not have gone around the boxes to the starboard side of the barge to see where the steamer was. If it were true that he had previously seen the steamer half a point to his starboard, and had thought that the tug was blowing the wrong whistle so as to run into the steamer, it is certain that this experienced mariner would not have been foolish enough to go "outside the boxes on the barge on the starboard side". Had he done so under the assumed circumstances (circumstances upon which the whole superstructure of libelant's case rests), the Court would have to infer that it was his intention to commit suicide. From the mere fact that he did go on the starboard side of the barge, it follows by all the laws of self-preservation and common sense that, up to the moment when he went to that place, he was satisfied that the situation was safe, and that he knew *down* to that moment of time that the "Ada Warren" had given the signals which safety and the rules dictated.

His testimony also indicates that the barge did not change its course. If it had changed its course, this witness would have been in the best position

to know it and would certainly have testified to that effect. If the "Ada Warren" did not have time to change her course, the collision was due to the fact that the "Meteor", under her port helm, swung her head to starboard and laid herself right across the channel "came right across", although she had indicated her intention to go ahead to starboard.

The only portion of the testimony of this witness, as to facts, which could be remotely applied for the use of libelant's theory is his claim that he saw the "Meteor" on the starboard side when he stood on the boxes; half a point. In the nature of things a judgment on bearings half a point either way, formed in a dark night, is not reliable. More conclusive than this hastily formed judgment is his conviction that he was safe, which is only consistent with the fact that the vessels were meeting practically head on, and that the "one whistle which they blew" was the correct signal. According to the testimony of Miller, all was well until the moment when he "went outside the boxes on the barge on the starboard side and * * * looked to see where the steamer was" (p. 69).

In that moment "*there* came the steamer right across the channel—that big steamer. It came right across. I think I says, 'He run into us' " (p. 69).

It thus appears from the testimony of this witness that the collision was caused by the "Meteor"

projecting herself across the channel instead of passing to her starboard.

That the diagram drawn by counsel on page 16 of the "brief for appellee" does not represent the situation as described by Miller, is obvious at a glance. Miller testifies that, from the barge, he first saw the "Meteor" half a point to his starboard (practically ahead of the barge). This would place the "Meteor", M, somewhere near the center of the line forming the righthand side of page 16. Instead of placing it there, counsel places M near the bottom part of that line (practically *about seven* points on the starboard bow of the barge), thus producing a grossly misleading situation. Furthermore, the diagram overlooks the fact that the "Meteor", according to the story of the libel and evidence, *went full speed astern* while swinging to starboard, and could not, therefore, have passed from M to M, as presented in the diagram. Again, if it were true, as the other side asserts, that the "Ada Warren", after just showing her green light on the starboard bow of the "Meteor", *exhibited her red light* and, for three minutes before the clash, was coming head on to the "Meteor", then the "A. W. combination" of the diagram would have to be swung about a right angle, stern to port, and it would then be impossible for the starboard corner of the barge to have collided with the "Meteor". Obviously, in the misleading diagram of page 16, the "Ada Warren" is, when striking the "Meteor", represented to be

still pursuing a course across the bow of the "Meteor", although the libel, evidence and argument of appellee charge that the collision was due to the fact that the "Ada Warren" *turned* to starboard, changed her course, left a safe course and came back into the path of the "Meteor". No argument could describe more eloquently the hopeless, and, indeed, desperate predicament of appellee than does the sketch on page 16 of its brief when examined in the light of the libel. As this matter alone is sufficient to dispose of the case of appellee, we crave the indulgence of the Court in dwelling on this point, and we invite the Court to review with us again the facts and situations recited in the libel, while keeping in view the sketch of page 16, brief of appellee:

First situation: "Meteor" sees green light of "Warren" off her port bow. "Meteor" proceeding in a westerly direction. "Warren" proceeding in a northeasterly direction. Both vessels hold their course.

Second situation: When—thousand feet apart, "Warren" "*turned to starboard so as to show both lights and proceeded directly against said steamship 'Meteor' head on*" (Art V, Ap. p. 11).

"Warren" "was proceeding at full speed".

This flagrantly contradicts the story told by the sketch. In the latter the "Ada Warren" has never turned to starboard and does not proceed directly

against the "Meteor" head on. Yet this sketch, false and contradictory to the allegations of the libel, and to every particle of the libelant's evidence, is presented to this Court as an argument to show that "the 'Ada Warren' must have been on the 'Meteor's' starboard side before she began to turn." Plainly, the sketch shows that, at the time of the collision, the "Ada Warren" had not turned, but was still proceeding in a northeasterly direction; plainly, therefore, if counsel's argument made at the present time is true, then the allegations of his libel and the averments of his witnesses are untrue.

V. The Argument Based Upon the Models.

There are two easy answers to this argument, either of which disposes of it conclusively:

A. IT IS BASED UPON ASSUMPTIONS INSTEAD OF FACTS.

Appellant has figured out that the tug and barge were lashed together at an angle of *25 degrees* and refers to libelant's exhibit "A", page 277 of the apostles, as authority for this statement. This exhibit was made roughly out of pasteboard from memory, to illustrate in a general way the combination of tug and barge and the relative sizes of the two. A glance at the exhibit shows that the outline of the figure representing the "Ada Warren" is not intended to, nor could it be, the exact form of that tug, nor of any tug that ever existed. It

is plain that, if the curve on her starboard bow be rounded or elongated in the slightest degree, or the stern part of the figure be tipped closer to the rectangle roughly representing the barge in ever so slight a degree, the angle between the tug and barge would at once be changed to a very considerable extent. We do not know if the angle between tug and barge is, in the figure, really 25 degrees; but the Court will certainly agree with us that even the most skillful draughtsman could not, from memory, reproduce to scale, in any accurate sense, the angle between two objects like a tug and barge, which have no mathematical outlines. Yet the whole argument is a juggling with numbers based upon the assumption that these numbers are mathematically accurate. The picture which counsel has evolved as the result of the calculation with assumed angles is shown in counsel's sketch on page 16 of the brief for appellee. We presume that this sketch was intended to present to this Court a correct reflection of the picture of tug and barge, as this picture existed in counsel's mind. By comparing the representation of tug and barge, as made in the sketch, with libelant's exhibit "A", it will be seen at a glance that this valuable angle between tug and barge, which forms the whole support of an argument, has now grown from 25 degrees to about 45 degrees. This growth, of course, is a valuable aid in making the argument stronger. However, we now invite the Court to drop the picture of "Exhibit A", and to concen-

trate its exclusive attention upon the picture of tug and tow as, for the purpose of his argument, it exists in counsel's mind (brief, p. 16). By what possible mechanical means could the tug "A. W." and the barge at its right as shown in counsel's diagram be "lashed together" so as to form a steady combination? And if they *could* possibly be lashed together in that particular manner, all the laws of elementary physics and common sense would cry out against the *navigability* of such a combination. Why should any sane being desire to *shove* a barge 130 feet long and heavily laden through the water, exposing the broadside of the barge to the resistance of the water, when the mere instinct of intelligence, not to speak of experience, would imperatively dictate that the barge and her tug should be as nearly parallel as it is possible to make them?

B. EVEN IF THE ASSUMPTIONS MADE WERE CORRECT, THE CONCLUSIONS THEREFROM DEFY THE LAWS OF NATURE AND VIOLATE COMMON SENSE.

The object of the calculation based upon the assumed angle between tug and barge is to show that,

"As Captain McFarland looked into the lights which appeared to be coming straight on, the combination was in fact moving to his starboard" (brief for appellee, p. 26).

The same idea is expressed on page 25 of the brief, where counsel says:

"That the two lights did not truly indicate the course of the 'Ada Warren', and that she

herself was proceeding toward the 'Meteor's' starboard, and hence contributing in causing the collision, is no fault of Captain McFarland."

It is easy to show that this argument defies the laws of nature. If the barge had her own locomotive power and that power moved her in the direction in which she was pointing, it would be true that the combination of the two, as bound together, would move neither in the direction of the tug's propulsion nor in the direction in which the motive power of the barge propelled the latter. The combination would move at a compromise angle between the two, in the direction of the diagonal of the parallelogram of forces. But counsel's argument overlooks the fact that the barge has no motive power. It is firmly attached, "lashed" to the moving vessel. Clearly, the direction in which such a combination travels is perfectly indicated by the direction in which the moving tug travels. It does not make the slightest difference whether the tow is lashed to starboard or to port, whether it is made fast to the stern or to the bow of the tug; the combination moves as the tug moves. When the tug exhibits her *red and green* lights to Captain McFarland, that mariner knows with certainty that the tug is coming head on, together with everything that is made fast to the tug, no matter where attached to it. And when the red and green lights of the tug approach nearer and nearer to his ship, the tug *in*

fact comes nearer and nearer with everything that is made fast to the tug. It is absurd to say that the red and green lights are approaching head on, while at the same time the combination is going to his starboard.

But assuming, for the moment, that the ordinary laws of nature are abolished when we deal with the case of a tug moving through the water with a barge lashed to its side; assuming, also, that such a combination develops side-winding qualities whereby certain parts of it, including the lights, may travel one way, yet the bulk of the combination is traveling another way, an expert in navigation like Captain McFarland would certainly not be ignorant of such phantastic attributes of a common craft; his expertness would impose on him the charge of knowing all facts connected with navigation, and it became incumbent upon him to so navigate his ship as to make allowance for the eccentricities of the combination, by giving corresponding leeway to his own ship.

VI. Various Contentions of Appellee.

A. CAPTAIN MCFARLAND'S COMPETENCE.

Appellee contends that Congress does not require the use of a federal pilot in these inland waters, referring to *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 186. This is necessarily true, as there are no federal pilots; but the case cited also holds

that the provisions contained in Sec. 4401 of the Revised Statutes are in force, requiring that “every coastwise sea-going steam-vessel” in the category of the “Meteor”, “*shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats.*”

The captain of the “Meteor” violated this law. The U. S. local inspectors, at the investigation into this collision, found “that the steamer ‘Meteor’, T. D. McFarland, master, was being navigated on that occasion without a licensed pilot in charge”, as required by law. The captain himself testified:

“Q. I ask you whether you know that it was unlawful to navigate in these waters without a licensed bay pilot?

Mr. DENMAN. I make the same objection.

A. I do” (Ap., p. 94).

For his want of actual skill in these dangerous waters appellee substitutes a constructive skill attributed to him partly on account of his experience as a pilot on the *Yukon River* (brief for appellee, p. 30). The brief introduces him as “an old river pilot, on the Yukon” (p. 32). There is nothing in the record of this case that we are able to discover to indicate that the captain ever was a pilot, or a passenger, or anything else, on the Yukon River; but as the Yukon River is reported to be particularly difficult to navigate, appellee’s choice from among the infinite number of facts which might be imported into this case from the outside world is indicative of a shrewd discrimination.

We beg to suggest, however, that even actual familiarity with the Yukon River would not qualify the captain of the "Meteor" to navigate a large steamer through Carquinez Straits, a place, of which Captain Hammer says:

"If he did not know the place, he would be apt to get into trouble, that is all" (Ap., p. 36).

B. THE TUG AND TOW HAD THE RIGHT OF WAY.

Appellee contends that the pilot of the "Ada Warren" showed by the answer, in two places, that he was charged with the burden of getting out of the way, first in the article where claimant denies that the collision

"would not have occurred if the persons navigating said tug had signified their intention to pass on the port side of said 'Meteor' in proper time, but in this behalf claimant says that said intention was specified by said tug in proper time, and according to the rules of the road" (brief for appellee, p. 34).

We submit that this allegation is entirely consistent with our contention that the duty to keep out of the way lay upon the "Meteor". It is even consistent with the fact, now disclosed, that the "Meteor", mindful of her obligation, blew the first whistle, and that the "Ada Warren" *then*, in proper time, signified her intention to pass on the port side of the "Meteor".

The second place in the answer referred to is an affirmative allegation which, in the light of the new evidence, is probably true (although it occurs

in that part of the answer which was virtually abandoned at the hearing). All that is necessary to show that it is probably true is to interpolate, immediately *before* said allegation, the fact hitherto suppressed, but now disclosed by the "Meteor" that she blew one whistle.

Our contention that the combination of tug and tow was the privileged vessel is conditioned upon the truth of the "Meteor's" contention that the vessels met on crossing courses. *If* they so met, then we claim that it was the "Meteor's" duty to keep out of the way. At the same time we insist that every circumstance disclosed by the evidence points to the fact that, when the tug and tow had swung out of San Pedro Bay to go up Carquinez Straits, while the "Meteor" was moving down the Straits, the vessels were meeting practically head on; and that the collision was caused by the fact that the "Meteor", after having had an understanding with the "Ada Warren" that they should *pass* on each other's port side, failed to pass, but stopped and laid herself across the channel.

In *The George S. Schultz*, 84 Fed. 508, cited at length by appellee (p. 38), the point here involved as to whether the tug and tow, on account of its encumbered condition, was privileged, was not raised. That case shows, however, that, where the tug and tow cross the bow of a privileged steamer with the sanction and permission of the latter, and the latter, under the impression that

both are safe, permits the burdened vessel to go so far as to make it impossible to keep out of the way, the privileged steamer is responsible if she persists in keeping her course and speed. On this point we contend that the case of the Schultz is favorable to libelant, even if the theory of claimant as to the physical cause of the collision be adopted.

C. THE VESSELS WERE NOT CROSSING VESSELS.

1. The "Meteor" was coming down the Straits, and the "Ada Warren" was going up. This undisputed fact alone makes improbable libelant's theory that the vessels were crossing vessels.

2. If claimant had known the truth about the facts of the collision, as libelant knew them; if the fact of the "Meteor's" first one-whistle had been stated in his libel, instead of being conveniently buried, libelant could never have come into the trial Court with the theory that these vessels met on crossing courses. Had libelant stated the whole truth in its libel, instead of suppressing an embarrassing, but cardinal fact, the facts of the libel would have compelled libelant to contend that the vessels met end on. What enabled libelant to formulate the contention that the vessels met on crossing courses was the suppression of the fact alleged in the master's affidavit; what prevented claimant from showing conclusively that the vessels did *not* meet on crossing courses was the deliberate concealment of that fact. At all times all the

probabilities of the case pointed to the fact that, while the "Ada Warren" was rounding the point near the place called "Oleum" and entering the Straits, first the red light of the "Meteor" was seen a little to the starboard of the "Ada Warren", and then, on or after rounding the point, the two vessels were on meeting courses.

Appellee makes much of the fact that the answer alleges that the tug blew one whistle "to indicate her intention to go to the *starboard* of said approaching vessel, and ported her helm" (brief for appellee, p. 41). We admit that this language was not carefully drawn, but at the same time we submit that reliance upon an inaccuracy which is obviously due to inadvertence is a mere quibble, which appellee could have afforded to waive if it had any substantial supply of meritorious argument.

D. THE SPEED OF THE "METEOR".

Appellee admits the *fact* that the "Meteor's" speed was 8 knots through the water, and thereupon proceeds to argue that this means 3 or 4 knots at most, over the bottom, taking into consideration that she was bucking the tide (brief, p. 43). The captain of the "Meteor" testifies that her speed was 8 knots an hour, making allowance for the fact that "*she was bucking a tide, which offsets the difference*" (Ap., p. 98). This is another case where appellee exhibits discrimination in exercising a choice between facts (though shown by its own witnesses) and more serviceable imagination.

If we suppose for a moment that the "Meteor", a powerful steamer coming on at full speed, passed a fixed spot on the shore at a rate of 3 knots an hour, what becomes of the facts of her master's story? He says that he first saw the "Ada Warren's" light 10 minutes before the collision. In these 10 minutes, at the rate of 3 knots per hour, he would have moved about one-half a mile (making but little allowance for the fact that part of the time he had stopped and reversed his engines). He also testifies that, when he first saw the "Ada Warren", she was 3 miles away. To enable the collision to have occurred, it would have been necessary for the heavily encumbered combination to cover $2\frac{1}{2}$ miles at the same time while this steamer, more easily manageable by reason of going against the tide, covered $\frac{1}{2}$ mile. Does appellee seriously intend to make such a contention before this Court? If the contention could be seriously made, why is it not vigorously advocated by appellee, considering that a speed of $2\frac{1}{2}$ miles per 10 minutes, indulged in at Carquinez Straits by this wild and excentric combination, would at once settle the responsibility for this collision?

It is respectfully submitted that the whole theory of the "Meteor", that the "Ada Warren", after having safely passed the bows of the steamship "Meteor", suddenly, from an impulse of self-destruction, changed her course and turned back into the path of the "Meteor", is inherently improbable

and smacks of the situation referred to by Mr. Justice Grier when he said, in *Haney v. Baltimore Steam Packet Co.*, 23 How. 287, 291:

“This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable and generally false.”

Appellee has admitted that it has the burden of proof on this extraordinary contention and, on the strength of this admission, has asked the Court for the privilege of answering this reply brief. There is absolutely nothing in the case to support this contention except the testimony of the “Meteor’s” master. This is contradicted by his own sworn statement, made when the facts were fresh in his mind; it is also contradicted by Miller, who says that “the steamer came right across the channel—that big steamer; it came right across”; and it is further contradicted by every probability that human experience and self-preservation can suggest.

We respectfully submit that a judgment obtained by conscious and deliberate misrepresentation of facts could not stand even on the props which all the technicalities of the common law could supply. We submit that a Court of Admiralty, acting upon principles of equity and justice, should welcome the truth even though it makes its appearance tardily, at the trial *de novo* on appeal, and should vindicate the lower Court by

reversing a decree which was plainly secured by withholding from the trial Court the eternal, and irrepressible truth.

Respectfully submitted,

LOUIS T. HENGSTLER,

Proctor for Appellants.

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No. 2267

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANIEL E. MORRIS, LOUIS A. LLOYD
and J. A. MAGUIRE, as Trustees of the
WARREN IMPROVEMENT COMPANY
(a corporation), claimant of the Tug "ADA
WARREN", her tackle, apparel and
furniture,

Appellants,

vs.

THE GLOBE NAVIGATION COMPANY
(a corporation),

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

Appellants respectfully petition for a rehearing
of this case, both on questions of law and fact,
and beg the Court's earnest consideration of this

application. We deeply appreciate the difficulty and delicacy of our position in being compelled to again ask this Court, as we asked the Court below at the trial of the case, to disregard the statements in the answer verified by the secretary of the Warren Improvement Company, which statements were made on information received from the pilot of the "Ada Warren"; also to disregard the pilot's testimony before the Local Inspectors, *and to accept as the facts of the case the showing made by appellee*. Certainly appellee can have no cause for complaint if its case is judged by its own exclusive showing. Appellee had every natural advantage in showing the actual and exact truth: Its vessel, the "Meteor", was a large steamer, with a plentiful, presumably intelligent, number of eye-witnesses on board. Apart from the testimony of a look-out, who was presumptively an eye-witness of the collision, there was available to appellee the testimony of *three men who stood on the bridge of the steamer just before the collision, viz.: the master in command, the quartermaster at the wheel, and the second officer*. (Apostles, page 83.) Of these the master alone was called by the appellee, and on his story the present decree stands and depends.

We solemnly believe that this Court, upon reconsideration of the basic questions of this case, will agree with us that the decree should be reversed for these reasons:

FIRST: IT IS MATHEMATICALLY DEMONSTRABLE THAT THE APPELLEE'S DEPOSITION-STORY, LAID BEFORE THIS COURT BY APPELLEE, IS NOT ONLY UNTRUE, BUT ALSO PHYSICALLY IMPOSSIBLE.

SECOND: IT IS ALSO DEMONSTRABLE BEYOND ALL QUESTION THAT THE COURT FELL INTO SERIOUS ERROR IN GIVING THE APPELLEE'S AFFIDAVIT-STORY A CONSTRUCTION WHICH WOULD MAKE THE AFFIRMANCE OF THE DECREE POSSIBLE.

We proceed to demonstrate these propositions.

I. THE UNDISPUTED FACTS OF THE CASE.

The absolutely undisputed facts are:

First. The "Meteor" was going *down the straits* of Carquinez from Port Costa. The "Ada Warren", with the barge lashed to her starboard side, was proceeding *up the straits* bound for Suisun Bay.

Second. The *starboard corner* of the "Ada Warren's" barge struck the "Meteor" on her *port bow*.

II. FROM THESE FACTS IT FOLLOWS THAT THE DEPOSITION-STORY OF THE MASTER IS NOT ONLY UNTRUE, BUT ALSO PHYSICALLY IMPOSSIBLE.

The story of the master, as reproduced in the opinion of this Court, is as follows:

(a) As to the movements of the "Ada Warren":

"That he first saw the tug about a point and a half off the port bow of the 'Meteor', first seeing her upper masthead light, then the lower

one, and a green light; that the green light seemed to be proceeding across the straits, but he was not able to determine whether the tug was going directly across at an angle, although he thought she was bound for South Vallejo; that when the two vessels were about one thousand feet apart the green light of the tug crossed the bow of the 'Meteor' from port to starboard until it could be seen probably one-quarter of a point on the starboard side of the ship, and that then the 'Ada Warren' showed both red and green lights and blew her whistle."

(b) As to the movements of the "Meteor":

"That up to that time the 'Meteor' had held her course and speed, but then answered with one whistle and her wheel was at once brought hard aport, and seeing that a collision was imminent she blew three whistles and was started full speed astern, the effect of which was to swing her to starboard; that the 'Ada Warren' never gave any other signal than the one whistle."

(c) As to the impact;

"That the starboard bow of the barge struck the 'Meteor' about thirty-five feet aft of her port bow, inflicting the injury for which the libel was brought."

We respectfully submit that this story is a defiance of the physical laws of nature. Assuming the one undisputed and indisputable fact that the STARBOARD corner of the barge, in the moment of collision, struck the PORT bow of the "Meteor", it follows at once that the facts alleged in (a) and (b) are IMPOSSIBLE and therefore untrue. We respectfully invite the Court to cut out "Libelant's

Exhibit 'A,'" Apostles, pages 277, and mark the *starboard* corner of the barge; to imagine this combination to first cross the bow of the "Meteor" from port to starboard, then to turn to its own starboard until the "Ada Warren" showed her red and green lights; and then to answer the question, how in the name of physical laws the *starboard* corner of the barge could ever come in contact with the *port* bow of a ship that was coming down the straits? How could the starboard bow of the barge, after having passed to the starboard side of the ship, and then turning so as to show both red and green lights, strike the ship about thirty-five feet aft of her port bow? The alleged facts cannot possibly co-exist, and it being admitted that the last fact (c) is true, it follows with mathematical certainty that the facts (a) and (b), as stated in the master's deposition, cannot possibly be true. We submit that, independently of the master's affidavit, the deposition of the master should be rejected as being intrinsically untrue, because physically impossible.

III. THE DEPOSITION-STORY OF THE MASTER IS ALSO PROVED TO BE UNTRUE BY HIS AFFIDAVIT.

The construction which this Court, in its opinion, has given to the affidavit of the master is, we are frank to admit, a great shock to appellant. We solemnly believe that the Court upon reconsideration of this question, will agree with us, *and the appellee*, that both narratives of the master cannot be true; that if either one of the two is accepted

as true, the other one is necessarily false. If the construction placed upon the master's affidavit were legally possible, it may be conclusively assumed that the astute proctor for appellee would not have failed to urge upon this Court such a valuable point. Our clear recollection is that the other side understood this affidavit as we understand it and he has not asked the Court to understand it otherwise; that, on this subject, the only request made to the Court was to send this case back for a retrial in order to give the master an opportunity to "explain". We verily believe that the Court has fallen into grievous error in misunderstanding the import of this affidavit; that it is a duty which we owe to the Court (apart from the duty of defending the rights of a client) to point out to the Court an error so serious in its consequences; and that—if the Court will afford us another opportunity of presenting a matter which, but for our shortcomings, we should have been able to clear up at the first hearing—the Court will eventually agree with us (and the proctor for appellee) as to the legal and moral value, in its present condition, of the testimony of the master of the "Meteor".

The case of the appellee is founded upon the contention that the "Ada Warren" gave a wrong signal and made the corresponding manoeuvre thereby producing the collision. This signal and corresponding manoeuvre were wrong only on the assumption that they were spontaneous, and not

invited by a signal of the “Meteor”. If they *were* invited and induced by the “Meteor’s” signal, then the signal of the “Meteor” was the *causa causans* of the collision. The crucial question of the case is, therefore: *Did, or did not, the “Meteor” give the first one-whistle signal?*

Looking to appellee’s evidence for an answer, we discover in the record two statements by her master: One made the day after the accident, when the facts were fresh in his mind, and presumably not hampered by collision theories; another made months later, under the protecting wing of learned counsel; the first in the form of an *ex parte* affidavit or protest, the second in the form of a deposition—both under oath. It is admitted that, *in the deposition*, the master testifies clearly, unqualifiedly and emphatically that the “*Ada Warren*” blew the first whistle.

Assuming now, for the moment, that the *affidavit* of the master shows that the “*Meteor*” was the one to blow the one-whistle first, what would be the effect? It would certainly follow that, on the one occasion or the other, the master swore falsely on a vital point and that his whole testimony should be rejected in a Court of Justice. If it were necessary to make a choice between the two statements, that statement would be chosen, as presumptively true, which was made when the witness’s memory was fresh and unclouded by theories; in other words, the statement would be accepted that the “*Meteor*” was

the one to blow the one-whistle, and this would justify the manoeuvres of the "Ada Warren" and exonerate appellant.

It follows, therefore, that the case hinges upon the simple question, *whether or not the master, in his affidavit, states that the "Meteor" was the first of the two vessels to blow one whistle.*

The Court, upon a perusal of the affidavit, finds that it does not understand the affidavit to contain a statement by the master that the "Meteor" was the first of the two vessels to blow one whistle. We respectfully petition the Court to review this finding. In doing so, we are actuated by a keen sense of responsibility and a firm belief that it is legally and equitably impossible to support this finding as to the meaning of the master's affidavit. We present this request with the greatest deference and in the strong conviction that the Court expects counsel charged with the conduct of a case to be insistently helpful in serving the ends of justice. We would certainly prefer to be unconnected with a case in which the perversion of truth plays so conspicuous a part, and we realize that the unreliability of the witnesses whom in a normal case we should rely upon, places us at a just disadvantage; but, to go into Court with clean hands, we were compelled to place ourselves at the mercy of the witnesses called by our opponents. We honestly believe that these witnesses took advantage of our weakness by perverting the truth; and our belief is founded upon their own showing.

The pertinent parts of the affidavit are as follows:

“That having the right of way under the local rules, the ‘Meteor’ held her course. Both vessels continued until seeing that the other vessel was not changing her course, as she should have done, and seeing there was danger of collision, the deponent STARTED TO PUT HIS HELM TO STARBOARD TO CHANGE HIS COURSE TO PORT to avoid collision, and HAD STARTED TO BLOW HIS WHISTLE TO GIVE NOTICE TO THIS EFFECT *when suddenly* the other vessel, which subsequently proved to be the Tug Boat ‘Ada Warren’ with barge alongside, blew one whistle and changed her course, showing a red light. (AT THIS TIME OF CHANGING HIS COURSE WHEN HE STARTED TO GIVE TWO BLASTS OF HIS WHISTLE, the deponent had already pulled the whistle cord and a short blast had been given before the change of course of the ‘Ada Warren’ was noticed.)”

It appears clearly that the events recited down to the clause in parentheses refer to two distinct points of time following each other in this succession:

First point of time: The master of the “Meteor” started to put his helm to starboard to *change his course, and had “started” to blow two whistles* to this effect;

Second point of time: “*When suddenly*” the tug blew one whistle and changed her course, showing a red light.

So far the opinion of the Court appears to agree with our view, and we admit that it would be possible to “start” to blow two whistles without going so far as to actually blow one whistle; and

that, therefore, down to this point, it does not appear clearly that the master of the "Meteor" blew any whistle before the second point of time arrived, when the tug blew one whistle.

But all possible doubt on this point is removed by the parenthetical statement which follows. The Court will note that this statement is in parentheses and, by referring back, *explains a previous statement*. The deponent was evidently conscious of the fact that the previous statement that he "started" to give a two-whistle signal required an explanation, and he therefore supplies, in parenthesis, the explanation to the effect that "*at this time of changing his course when he 'started' to give two blasts of his whistle*", something else had already happened, viz.: "*a short blast had been given by him.*"

The point of time referred to in the parentheses by the words: "this time of changing his course when he started to give two blasts of his whistle", refers back to a time previously mentioned (*First point of time*); and thus the time previously referred to, when the master "started to put his helm to starboard to change his course, and had started to blow his whistle to give notice to this effect", and "this time of changing his course when he started to give two blasts of his whistle", are *one and the same moment of time*. At that time previously referred to ("First point of time"), "the deponent *had already* pulled the whistle cord and

a short blast *had been given*". The deponent, therefore, states that he gave a short blast at or before the "First point of time", *consequently* BEFORE the "Second point of time", viz., the time when the tug blew one whistle.

We respectfully, and with all deference, submit that the Court has fallen into the error of placing the events stated in the affidavit chronologically in the same order in which they are stated in the affidavit, and has overlooked the fact that the event stated in parentheses, although stated in the affidavit *after* the other events, did not chronologically occur after the other events, but that the statement in parentheses is *explanatory of a statement previously made*, and that the event described in the parentheses is *chronologically simultaneous* with an event previously described in "First point of time", above, the two being clearly identified by the use of identical terms. The very fact that the statement is added in parentheses indicates that it is not intended to add a new event, but to explain a statement previously made. Even if the parentheses were not deemed sufficient to indicate such an intention, the express words used can leave no doubt that the statement dates back to a time previously referred to. "*This time of changing his course when he 'started' to give two blasts of his whistle*" is certainly no other time than the time when "the deponent 'started' to put his helm to starboard to *change his course to port and had*

'started' to blow his whistle to give notice to this effect.'" The statement in parentheses simply explains what deponent meant by the ambiguous manoeuvre of "starting to give two blasts"; it meant—so the document says—that he "had already pulled the whistle cord and a short blast had been given." In other words: He "had already pulled the whistle cord and a short blast had been given, *when suddenly* the other vessel, which subsequently proved to be the Tug Boat 'Ada Warren' with barge alongside, blew one whistle and changed her course, showing a red light."

The construction which the Court gives to this affidavit would only be possible if, in the place of the parentheses and the words within the parentheses, the following words were substituted: "The deponent had already pulled the whistle cord and a short blast had been given before the change of course of the 'Ada Warren' was noticed." Only by such a substitution could the conclusion of the Court be justified, that,

"He then states in the affidavit that he gave a short blast before he *noticed the change of course* of the 'Ada Warren'. This is by no means saying that the 'Ada Warren' had not before that blown her whistle."

But such a conclusion is impossible, unless the affidavit be changed by striking out the parentheses, and by striking out the words: "*At this time* of changing his course when he started to give two blasts of his whistle." To make a change of

this nature in the affidavit would be tantamount to making a new document out of it. Counsel for appellee could not ask the Court to do so, and the Court would not intend to do so on its own motion.

We respectfully submit that, if the facts of the collision are to be derived from the master's affidavit, that affidavit shows beyond a reasonable doubt that the "Meteor" was the first to blow one whistle.

IV. THE UNDISPUTED FACTS CONFIRM THE TRUTH OF THE AFFIDAVIT-STORY.

The master's story, as given in his deposition, is flatly contradicted by his affidavit. Not only is it impossible to reconcile the two, but that part of the evidence supplied by the appellee which is trustworthy, undeniable and undenied shows to a degree of mathematical certainty that the story of the deposition is untrue. It is untrue because it is *physically impossible*. It exhibits a defiance of the laws of nature. There is one fact which nobody in this case has ever denied: The wounds which these vessels inflicted on each other when they came together. Nobody has denied it because it cannot be denied; because it is a stubborn physical fact incapable of qualification by the testimony of human witnesses and involving no question of credibility. *It is the fact that the starboard bow of the barge struck the "Meteor" on her port bow.* Taking the deposition-story of the master as

summed up in the opinion of the Court, and assuming the *fact* “that the *starboard* bow of the barge struck the ‘Meteor’ about thirty-five feet aft of *her port bow*”, we defy appellee to show, or even to pretend to believe, that this physical fact could possibly be the culmination of the events stated to be true in the master’s deposition.

Assuming it to be true that

“when the two vessels were about one thousand feet apart, the green light of the tug crossed the bow of the ‘Meteor’ from port to starboard until it could be seen probably one-quarter of a point on the starboard side of the ship, and that then the ‘Ada Warren’ showed both red and green lights and blew her whistle; that up to that time the ‘Meteor’ had held her course and speed, but then answered with one whistle and her wheel was at once brought hard aport, and seeing that a collision was imminent she blew three whistles and was started full speed astern, the effect of which was to swing her bow to starboard * * *”
(cited from the Court’s opinion).

By what laws of nature could the *starboard* bow of the barge lashed to the starboard side of the tug have possibly struck the *port* bow of the “Meteor”? Or, reversing the proposition and starting with the latter fact as *the* fact, how could the story of the deposition be true by any possibility? How could an injury to the port bow of the “Meteor” ever have been produced in the manner described in the master’s deposition, except by abolishing the laws of nature and substituting therefor a fairy

trick? We respectfully invite the Court to place the models introduced in evidence in such a position that the starboard corner of this rectangular barge comes in contact, under any possible angle, with the port bow of the "Meteor", and, with this picture before it, to read the story of the "Meteor", either as it appears in the master's deposition, or in the version given by proctor for appellee in his argument, or in the statement of the Court in its opinion. The result is inevitable. We firmly believe that the undisputed physical facts, together with the laws of nature, will impel the Court to the irresistible conclusion that the story to which appellee asked the trial Court, and now asks this Court, to give credence as the truth is false, because impossible. Either the testimony on which the decree in this case is founded must be stricken out, or the facts of nature must be revised.

The indisputable and undisputed facts in the case really point consistently to the probable truth. First, it is admitted that the "Meteor" was going *down* the Straits of Carquinez; Second, it is admitted that the "Ada Warren", coming from San Pablo Bay, was going *up* the straits (and not, as the master of the "Meteor" mistakenly thought, bound for South Vallejo); Third, it is admitted that the collision took place near the entrance of the straits; Fourth: The chart shows that the channel through San Pablo Bay and the straits meet at an angle, and that a vessel going up San Pablo

Bay and turning into the Straits of Carquinez must change her course; Fifth, it is admitted that, in the moment of the collision, the "Meteor" had swung to her starboard and was lying across the straits, with her head towards the north; Sixth, it is admitted that the starboard corner of the "Ada Warren's" barge struck the port bow of the "Meteor". From these admitted facts it would naturally follow that as the "Ada Warren", coming from San Pablo Bay and swinging into the straits from a northeasterly in an easterly direction, would first show her green light, and then both lights, to the "Meteor", as the latter came down the straits; that the vessels, being bound in opposite directions, were in no sense crossing vessels, and that the starboard corner of the barge could have struck the port bow of the "Meteor" in only one way, viz., on the *necessary* assumption that the "Ada Warren" was never on the starboard bow of the "Meteor". How is it possible, on the admitted facts, to maintain the theory that the "Ada Warren" was at fault in not blowing two whistles and not directing her course to port? How is it possible that the starboard corner of her barge could have ever come in contact with the port bow of the "Meteor", if the "Ada Warren" had ever, within a few minutes before the collision, crossed the bow of the "Meteor" in a direction from the latter's port to starboard?

**V. WHAT WOULD HAVE BEEN THE EFFECT, IF THE AFFIDAVIT
HAD BEEN IN EVIDENCE AT THE TRIAL?**

We respectfully request the Court to realize what would have happened if we had been in possession of the affidavit of the master at the hearing of this cause before the distinguished judge who tried the case, or what would have happened if we could have brought to the notice of the trial Court, even after its decree was entered and before this appeal was brought, this solemn statement of the master, made at a time when it was easy and natural for him to tell the truth. We can entertain no doubt that a motion to re-open the case would have been granted; that the two stories of the "Meteor's" master would have wiped out his testimony and destroyed the frail fabric out of which libellant constructed its case.

With the affidavit in evidence, the trial Court could have adopted either one of two possible views: Either, that the affidavit of the master discredited all his testimony as given in the deposition; or, that the affidavit story would have been chosen as being, as between the two statements, the one probably true, for the reasons: (a) that it was made immediately after the occurrence; (b) that it was consistent with the undisputed facts. Either view was bound to lead inevitably to a dismissal of the libel.

No laches can be imputed to appellant for failure to place this evidence before the lower Court.

Appellant went to trial, saying: I do not know the truth as to this collision; the testimony of the "Meteor's" witnesses must be accepted as the truth. Did the witnesses for libelant show the truth to the trial Court? Did the three officers, eye-witnesses, on the bridge of the "Meteor", appear before the Court and tell the facts? Only one of them appeared and affirmed under oath, the fact to be that the other vessel blew, at the wrong time, the first whistle, and, suiting its manoeuvre to the signal, wrongfully ran into his ship. He knew that this statement was contrary to the truth and his previous oath; he knew that he was deceiving the Court,—and the consequence of the deception was the decree of the Court. We were committed to the position that the truth, as it should come from his lips, was *the truth*. We had no means of knowing of his affidavit previously made. The affidavit was hidden from our view and from the view of the trial Court. Had we known it, had the trial Court known it, the case would never have reached this Court.

VI. THE ALLEGED CORROBORATIVE EVIDENCE.

The Court, in its opinion, finds that the deposition-story of the master of the "Meteor" is "somewhat corroborated" by alleged testimony of pilot Oden given before the local inspectors. We respectfully submit that the finding of the inspectors

certainly does not show that the one blast of the "Ada Warren" therein referred to was the first signal blown by either vessel. The record of this case does show, however, that the reason why appellant discredited him and declined to call him as a witness in a Court of justice was, that appellant did not believe that he testified truly before the inspectors. He was not called as a witness in this case by either party. Under these circumstances appellant should not be charged with "facts" derived from this course.

The Court finds "positive confirmation of the master's testimony" in portions of that of Miller. It is respectfully submitted that the testimony of this witness does not show what signals, if any, were given by the "Meteor"; it does not purport to show, nor does it show, whether or not the "Meteor" gave any signals, either before or after, the towboat blew one whistle. For all that appears from that source, the "Meteor" may have given one blast before the one whistle of the "Ada Warren". His testimony, in so far as it has a tendency to show that the vessels ever were on the starboard of one another, also suffers clearly from the incurable vice that it is inconsistent with the undisputed fact that the starboard corner of the barge struck the port bow of the "Meteor".

On the argument in this Court the proctor for appellee, realizing the moral and legal force of the deductions called forth by the facts as acci-

dent had placed them side by side in the printed record of this case, moved the Court to send the case back for a trial de novo. We opposed the suggestion, believing that a case tainted with perjury should not be continued in a Court of justice, to afford an opportunity to dishonest witnesses to explain the inexplicable. But we now realize that a re-opening of the whole case would be a nearer approach to justice than the disposition of it which will result from an affirmance of the decree. If the case were sent back to the lower Court for further proceedings, the proof of the facts would still rest exclusively with the appellee, and the truth would still have to be extracted from appellee's witnesses. If appellee were given the opportunity, in a new trial of the facts, to steer around the shoals of perjury and deception upon which truth was shipwrecked and the judgment of the lower Court obtained, we now believe that the result, whatever it might be, would be more in consonance with the principles of justice than the present discouraging condition of the case.

At the trial we met the libelant on this issue: We have no reliable eye-witnesses; we must accept the facts from the testimony of your witnesses. Whereupon libelant proceeded to tell the Court a story which resulted in the present judgment. Later it appeared, by libelant's own evidence, that the story told the Court by the chief witness on oath flatly contradicted a previous story told by

the same witness on oath. Should the claimant be made to suffer because the libelant was successful in burying the truth until after the cause was tried, and judgment rendered? Has libelant any cause to complain if this Court, in this trial *de novo*, decides the case on *evidence exclusively furnished by libelant*?

The position of the parties in the lower Court was this:

Claimant had a pilot whose stories regarding the facts of the collision could not be reconciled; for this reason claimant went to trial without relying on this witness and placed itself at the mercy of the witnesses of libelant.

Libelant had a master whose stories regarding the facts of the collision could not be reconciled; nevertheless libelant, at the trial, produced this witness, choosing between his inconsistent stories the one which would and which did, result in judgment for libelant.

The position of the parties in this Court is this:

Now the truth has accidentally come to light. Now it appears that libelant's chief witness misled the Court below; that both his stories cannot be true, and that therefore all his testimony should be rejected; that, if either story be accepted, presumptively the true story was the one sworn to immediately after the accident, when the facts were fresh in his mind and he could have formu-

lated no theories, and that this story exonerates the “Ada Warren”; and that, in addition to all this, the physical fact of the injury to the two vessels confutes the story told in the Court below, and points to true facts which exonerate the appellant.

The judgment appealed from was obtained upon testimony discredited by the character of the witness and disproved by the immutable laws of nature, and should be reversed.

We respectfully submit that the motion for a rehearing should be granted.

LOUIS T. HENGSTLER,
Proctor for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

LOUIS T. HENGSTLER,
Counsel for Appellants and Petitioners.

No. 2267

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANIEL E. MORRIS, LOUIS A. LLOYD and J. A. MAGUIRE, as trustees of the WARREN IMPROVEMENT COMPANY (a corporation), claimant of the tug "ADA WARREN", her tackle, apparel and furniture,

Appellants,

vs.

THE GLOBE NAVIGATION COMPANY
(a corporation),

Appellee.

OPPOSITION TO PETITION FOR A REHEARING.

Counsel's ardor has led him to file a petition for a rehearing based on statements so far from the facts, and so abounding in unnecessary abuse of witnesses, that it almost tempts us to pray that it be stricken from the files.

Aside from the abuse, the gravamen of the petition is that Captain McFarland has failed in his depo-

sition to explain how the starboard bow of the barge of the "Ada Warren" could strike on the *port* bow of the "Meteor" if the barge and tug had crossed ahead of the "Meteor" to her starboard side. This statement is not true. Captain McFarland makes a complete explanation of the manoeuvre. The quartermaster, Dick Miller, gives the complementary explanation from the barge's viewpoint. The court itself finds the simple fact on which the explanation rests

This fact is that when the "Meteor" saw the "Ada Warren" 1000 feet away, having just crossed to her starboard bow and heard her one whistle indicating that she was coming back to pass to port, he *reversed his propeller full speed and ported his helm*. The reversing threw the "Meteor's" head to starboard, thus helping her to pass the "Ada Warren" to port, if possible, as her one whistle indicated she would attempt to do, while stopping her speed to avoid the collision which to the "Meteor" seemed impending. The porting of the "Meteor's" helm turned her still more to starboard, in a further attempt *in extremis* to carry out the "Ada Warren's" one whistle manoeuvre. The result was to expose the "Meteor's" port side towards the forward, i. e., starboard, end of the "Ada Warren's" barge as with rapidly diminishing speed the "Meteor" approached the colliding point, turning to her starboard.

The opinion found that the "Ada Warren" "seeing that a collision was impending, blew three whistles and was started full speed astern, the *effect of which*

was to swing her to starboard''. This swinging to starboard *must* have exposed her port side to the "Ada Warren's" barge's starboard bow, as the angle at which she was lashed brought the starboard bow forward.

See model in evidence, Apostles, p. 277.

The testimony on which this finding rests is as follows:

"Q. What did you do?

A. I answered with one, and immediately blew three whistles; put the wheel hard aport and started astern full speed."

Apostles, p. 86.

"Q. And now I understand you to say that putting her at full speed astern threw her bow to the starboard?

A. Yes, sir.

Q. And was her bow thrown to starboard in this case?

A. Yes, sir.

Q. And you say the 'Ada Warren' struck you on the starboard or port side?

A. The port bow."

Apostles, p. 92.

The above is illustrated by our diagram at page 16 of our brief.

Miller, the quartermaster passenger, exactly corroborates this manoeuvre as follows:

"Q. Let me ask you: When you saw the vessel approaching on your starboard bow, if you had continued on the course you were on, would you have cleared her? If the tug and tow had continued on the course you were on when you

saw the vessel *on the starboard bow*, would you have cleared her?

A. Yes, I believe it. He was blowing no whistle—he blew one whistle and the big steamer changed his course and went across us. The barge did not change its course at all. I cannot say that—nothing about that. *The big steamer changed and came across.*”

Apostles, 70, 71.

What shall we say of a counsel who in capitals asserts that it is “mathematically demonstrable” that the above manoeuvre is “physically impossible”? What shall we say of him when *he knows* that this is the explanation given at pages 26, 27 and 28 of our brief, where we go more fully into the deceptive effect of the appellants’ misplaced lights?

The appellants’ naive and “delicate” request at the opening of its petition, that the court disregard the solemn admissions of its pilot and of its pleadings, would be amusing if it had but frankly stated the facts as to these admissions. The amusing features we deal with later. The request is as follows:

“We deeply appreciate the difficulty and *delicacy* of our position in being compelled to again ask this court, as we asked the court below at the trial of the case, to disregard the statements in the answer verified by the secretary of the Warren Improvement Company, which statements were made on information received from the pilot of the ‘Ada Warren’.”

This seems lacking in candor in the following particulars:

a. Appellants did not ask the lower court to disregard the *statements* of their answer. On the contrary they asked that but one statement be disregarded and be stricken from the answer. That allegation, entirely irrelevant to any evidence offered thereafter, was stricken out at the trial, which was conducted *with the remaining admissions thus consciously left in*. Among the admissions thus consciously a part of appellants' case, was the one that *their own vessel had blown the first whistle*. Their request to disregard a certain other particular statement emphasizes their reliance on the sentence immediately preceding on which the case was tried.

See Apostles, pp. 22, 24, 29.

b. Appellants would lead us to believe that their only source of information on which to base their pleadings was the "Ada Warren's" pilot. On the contrary it appears that prior to the time they thus consciously left in these admissions, they had received a written statement from Louis Kittelsen, the lookout on their own vessel. This statement was examined by both Professor Hengstler and Hammer, the captain of the tug. *It is inconceivable that, if the lookout had not agreed that his own vessel had blown the first whistle, the admission that she had, would have thus been consciously left in*. The record shows that a request to disregard this admission never was addressed to the lower court.

c. Appellants fail to show any motive which would lead their pilot Oden to tell their counsel and Hammer and Church that he blew the first whistle when in fact

he had not done so. That he did tell them so is evident from the pleading itself. Was it out of any tenderness for Captain McFarland, who he claimed had wrongfully answered him and brought about a state of affairs which jeopardized and subsequently lost his license, that Oden thus agrees with him as to who blew the first whistle?

Though having so much to explain for themselves, appellants' delicacy does not prevent them from continuing to call the opposing captain a *perjurer* because he agrees with their own pilot and lookout, after the court has reviewed the evidence on which the charge is made and declined to find any inexplicable inconsistency in it. It would seem that if there is such doubt as to the construction of the alleged conflicting statement in the affidavit, common human kindness required a request on the part of the appellants at the hearing of the appeal that the trial be reopened, that the disputed affidavit at least be introduced in evidence and McFarland be given his chance to explain it.

There are many things McFarland might have said if given this chance. One is that the proctor who preceded Mr. Denman in this case drew up the affidavit; that he was entirely inexperienced in admiralty matters; that he made a transposition in the succession of facts, not realizing their significance and that McFarland signed the affidavit casually or hurriedly, just as dozens of men sign papers prepared by attorneys, relying on the belief that counsel will not make a mistake. Surely if a law professor and the court

disagree as to the meaning of this legally phrased document with its long parenthetical clauses, a sailor man cannot be blamed if, on casual inspection, he thinks it tells the story as he actually saw it. With such a likely suggestion as to what occurred, is counsel entitled, after refusing to reopen the case, to call this man a "perjurer", to say he is a "dishonest witness", that his testimony is a "shoal of perjury and deception upon which truth was shipwrecked", and to declaim on how "murder will out"?

And now counsel, having refused our offer to reopen the case and give McFarland his chance, and having sought a reversal of the judgment on evidence never before the court on the question of the collision and been worsted on the theory that even if it were introduced it would not benefit him, comes with unjust abuse upon his lips and begs in the name of "delicacy" for the privilege which he formerly denied the object of his attack. May counsel thus blow hot and cold as the event requires?

All this is rather unpleasant and it is with real relief we find we can conclude our opposition with something amusing.

Distinguished counsel for the "Ada Warren" says that his pilot told his captain that he blew the first whistle and that the errors of the opposing vessel thereafter caused the collision. He also has a written statement from his lookout which evidently agrees

with this contention. He frames his pleadings on this theory and goes to trial on it. He later discovers that the admission of his pilot, with which his lookout must have agreed, is practically a confession of fault. And then he blandly asks the court to ignore both the admission and the averment of the pleading because, forsooth, he concludes his pilot is unreliable! There is no proof offered that he is unreliable beyond the mere ipse dixit of counsel, who finds that his testimony is displeasing to him.

What has become of the seriousness of trial procedure when a counsel attempts, with apparent gravity, to wipe out the adverse admission of the principal actor on his vessel in a collision case by merely attaching to him the label "unreliable", without a line of evidence to show his unreliability? True, says counsel, he admitted fault and true also I spread the admission on my pleading, but don't pay any attention to it. Why, see! I don't even put him on the stand myself!

It is submitted that, eliminating entirely McFarland's testimony, the record clearly sustains our contention that the "Ada Warren" erred in blowing one blast just after she crossed our bows from port to starboard, and that she rammed our port bow with her barge's forward and starboard bow, as, on a reversed propeller, we swung to starboard before her and exposed our port side. It is further submitted

that even if McFarland's testimony was necessary, the appellants' abusive conduct, coupled with their refusal to open the case at the hearing, has lost them any right at this late day to ask to reopen the case and re-examine them on their affidavit.

WILLIAM DENMAN,

DENMAN AND ARNOLD,

Proctors for Appellee.

United States
Circuit Court of Appeals

For the Ninth Circuit.

BERRY BROTHERS, a Corporation,
Appellant,
vs.

R. B. SNOWDON, as Trustee in Bankruptcy of EDWIN
L. GRAVES and GEORGE E. LA BELLE, Co-
partners as GRAVES & LA BELLE and FED-
ERAL PAINT & WALL PAPER CO., and
EDWIN L. GRAVES, Individually, and GEORGE
E. LA BELLE, Individually, Bankrupts,
Appellee.

In the Matter of EDWIN L. GRAVES and GEORGE
E. LA BELLE, Copartners as GRAVES & LA
BELLE and FEDERAL PAINT & WALL
PAPER CO., and EDWIN L. GRAVES, Indi-
vidually, and GEORGE E. LA BELLE, Individu-
ally.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

FILED

AUG 13 1913

No. 2286

United States
Circuit Court of Appeals

For the Ninth Circuit.

BERRY BROTHERS, a Corporation,
Appellant,
vs.

R. B. SNOWDON, as Trustee in Bankruptcy of EDWIN L. GRAVES and GEORGE E. LA BELLE, Copartners as GRAVES & LA BELLE and FEDERAL PAINT & WALL PAPER CO., and EDWIN L. GRAVES, Individually, and GEORGE E. LA BELLE, Individually, Bankrupts,
Appellee.

In the Matter of EDWIN L. GRAVES and GEORGE E. LA BELLE, Copartners as GRAVES & LA BELLE and FEDERAL PAINT & WALL PAPER CO., and EDWIN L. GRAVES, Individually, and GEORGE E. LA BELLE, Individually.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Counsel.

FRANK E. GREEN, Esq., Attorney for Claimant
and Appellant,

230 Burke Building, Seattle, Washington.

CASSIUS E. GATES, Esq., Attorney for Trustee
and Appellee,

329 Central Building, Seattle, Washington.

HENRY F. McCLURE, Esq., Attorney for Trustee
and Appellee,

1509 Hoge Building, Seattle, Washington.

WALTER A. McCLURE, Esq., Attorney for Trustee
and Appellee,

1509 Hoge Building, Seattle, Washington.

WILLIAM E. McCLURE, Esq., Attorney for Trustee
and Appellee,

1509 Hoge Building, Seattle, Washington.

[1*]

[Proof of Claim of Berry Brothers.]

To Frank E. Green, Seattle, Wash.

We, Berry Brothers, of Detroit, in the county of Wayne and State of Michigan, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such

*Page-number appearing at foot of page of original certified Record.

meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for us and in our name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for us to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due us under any composition, and for any other purpose in our interest whatsoever, with full power of substitution.

IN WITNESS WHEREOF, we have hereunto signed our name and affixed our seal the eighth day of February, A. D. 1913.

BERRY BROTHERS. [Seal]

W. R. CARNEGIE, [Seal]

Assistant Treasurer.

Signed, sealed and delivered in presence of

E. M. DILL.

H. J. WALSH. [2]

Acknowledged before me this eighth day of February, A. D. 1913.

[Seal]

EVERETT M. DILL,

Notary Public, Wayne County, Michigan.

My commission expires June 19th, 1916.

State of Michigan,
County of Wayne,—ss.

On this eighth day of February, 1913, before me appeared W. R. Carnegie, to me personally known, who being by me duly sworn did say that he is the Assistant Treasurer of Berry Brothers, a corporation organized under the laws of the State of Michigan, and that he executed the within instrument on behalf of said corporation, being duly authorized so to do, and that the seal affixed thereto is the corporate seal of said corporation; and said W. R. Carnegie acknowledged said instrument to be the free act and deed of said corporation.

[Seal]

EVERETT M. DILL,

Notary Public, Wayne County, Michigan.

My commission expires June 19th, 1916. [3]

State of Michigan,
County of Wayne,—ss.

On the 8th day of February, A. D. 1913, came W. R. Carnegie, of Detroit, in the county of Wayne, State of Michigan, and made oath and says that he is the assistant treasurer of Berry Brothers, a corporation organized and existing, under and by authority of the laws of the State of Michigan, and carrying on business at Detroit, in the said county of Wayne, and State of Michigan, and that the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said Berry Brothers, in the sum of Eighteen Hundred and Sixty-one and 50/100 Dol-

lars (\$1861.50); that the consideration of said debt is as follows: Goods, wares and merchandise, sold and delivered as per itemized statement hereto attached; that no part of said debt has been paid (except none); that there are no setoffs or counterclaims to the same (except none) and that said Berry Brothers has not, nor has any person by their order, or to the knowledge or belief of said deponent, for their use, had or received any manner of security for said debt whatsoever—none—and that no note has been received for said account nor has any judgment been rendered thereon—none.

W. R. CARNEGIE.

Subscribed and sworn to before me this 8th day of February, A. D. 1913.

[Seal]

EVERETT M. DILL,

Notary Public, Wayne County, Michigan.

My commission expires June 19th, 1916.

[Endorsed]: Proof of Claim of Berry Brothers, Detroit, Mich. Filed 7th day of March, A. D. 1913, 2 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Jun. 5, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [4]

Objections to Claim of Berry Brothers.

Comes now R. B. Snowdon, by his attorneys, McClure & McClure, and referring to the claim of Berry Brothers filed in the above-entitled proceedings on the 7th day of March, 1913, in the sum of Eighteen Hundred Sixty-one and 50/100 (\$1861.50)

Dollars, objects to the allowance of the same for the following reasons:

1. That proper credits have not been allowed for payments made on said account.

2. That subsequent to the first day of the four months immediately preceding the filing of the petition by the above-named bankrupts, the said Berry Brothers, a corporation, claimant, with knowledge of the insolvency of the said Graves & LaBelle, and without any present consideration therefor, received from said Graves & LaBelle, certain goods, wares and merchandise, the same being the property of the bankrupts, of the value of approximately Three Thousand (\$3,000) Dollars, thereby obtaining a preference, and enabling them to receive a larger proportion of their claim than the other creditors of said bankrupts of the same class, the said Graves & LaBelle being then insolvent.

McCLURE & McCLURE,

Attorneys for Trustee.

Service of within objections and receipt of copy admitted this 15th day of April, 1913.

FRANK E. GREEN,

Attorney for Berry Bros.

[Endorsed]: Objections to Claim of Berry Brothers. Filed April 15th, 1913, 3 P. M. John P. Hoyt, Referee. Filed U. S. District Court, Western District of Washington, June 5th, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [5]

**Stipulations Regarding Objections to Claim of
Berry Brothers.**

IT IS HEREBY STIPULATED, by and between the Trustee in the above-entitled matter and Berry Brothers, claimants, each acting through their respective counsel, that the goods, wares and merchandise referred to in the objections to the claim of Berry Brothers filed herein by the said Trustee, were delivered by the said Berry Brothers to Graves & LaBelle, the bankrupts herein, under and by virtue of a written agreement, copy of which is hereto attached, marked Exhibit "A," and made an integral part of this stipulation.

IT IS FURTHER STIPULATED AND AGREED, that the said Berry Brothers paid the freight on said goods, wares and merchandise to Seattle, paid the cartage thereon from the cars to the warehouse of said Graves & LaBelle, and paid the insurance and storage thereon during the entire time said goods, wares and merchandise remained in said warehouse. The said goods, wares and merchandise were put in the warehouse of said Graves & LaBelle. That there were other goods, wares and merchandise belonging to the said Graves & LaBelle in the same warehouse.

IT IS FURTHER STIPULATED, that said Berry Brothers at the time said goods were shipped to Graves & LaBelle, delivered to the latter detailed statements covering the whole shipment, and that said Berry Brothers at various times withdrew parts of said goods, wares and merchandise stored as afore-

said and sold the same on their own account independent of, but with the knowledge of and without objection by said Graves & LaBelle. That whenever Graves & LaBelle withdrew any portion of said stock in their warehouse, report of such withdrawal was made to said Berry Brothers, whereupon monthly statements [6] were rendered by said Berry Brothers to said Graves & LaBelle for the amount of stock so withdrawn during the preceding month.

IT IS FURTHER STIPULATED, that on or about November 16, 1912, said Berry Brothers, with knowledge of the financial condition of said Graves & LaBelle, and with knowledge that bankruptcy proceedings might be instituted within a short time after said date withdrew from said Graves & LaBelle, the goods, wares and merchandise theretofore delivered by Berry Brothers then remaining in said warehouse of the value of about Three Thousand (\$3,000.00) Dollars. That some of the creditors of said bankrupts interposed objections to the return of said goods, but that in order to avoid litigation said objections were waived and Berry Brothers were allowed to retake said stock upon condition that they would, in case of bankruptcy proceedings within four months of said date, permit the question of their right to the possession of said goods be submitted to the bankruptcy court of this district. That a copy of such agreement, directed to one of the creditors of said bankrupts, is hereto attached, marked Exhibit "B," and made a part of this stipulation; that the trustee does not waive the contention that the said agreement (Exhibit "B") was intended to

and did leave the parties in the condition in which they were before the execution of said agreement and the carrying out of the same, it being the intent and purpose of said agreement, as the trustee contends, that the retaking of said merchandise by said Berry Brothers should not be deemed to be, and should not be, a waiver by the bankrupts, or by their creditors, of any right or rights whatsoever. [7]

IT IS FURTHER STIPULATED, that either party may introduce proof in addition to the matters and things recited in this stipulation.

McCLURE & McCLURE,
Attorneys for Trustee.

FRANK E. GREEN,
Attorney for Berry Brothers. [8]

[Exhibit "A" to Stipulation Regarding Objections to Claim of Berry Brothers—Agreement, Dated March 18, 1912, Berry Brothers, Ltd., and Graves & LaBelle.]

March 18, 1912.

Agreement between Berry Brothers, Limited, of Detroit, Michigan, Party of the First Part, and Graves & LaBelle of Seattle, Washington, Party of the Second Part:

The Party of the Second Part hereby agree to store such goods that the Party of the First Part may ship on consignment to the Party of the Second Part for the purpose of Sale by said Graves & LaBelle.

The Party of the Second Part agree to report on the first of each month the amount of goods sold by

them from said Stock for which Party of the First Part will render an Invoice at the regular Terms and Prices of such goods according to the quantity sold.

The Party of the First Part agree to pay the Party of the Second Part the cost of Cartage in Seattle from the Car to their Warehouse of each consignment of goods, and 3¢ per case per month for Storage based on the Stock on hand at the first of each month.

The Party of the First Part will carry and pay for such Insurance as they deem necessary for the goods on consignment.

The Party of the First Part will render a Memo Invoice to the Party of the Second Part of all goods shipped on consignment, and will credit to such consignment account the amount of goods that are sold each month from said Stock, and the Party of the Second Part agree to pay for such goods sold by them, or taken from consigned goods while in their possession on the Terms which they are billed by the Party of the First Part on their regular Invoice.

It is also agreed that this Contract can be terminated at any time upon thirty days' written notice from either Party.

BERRY BROTHERS, LIMITED.

JAS. S. STEVENS,

Asst. Genl. Mngr.

GRAVES & LaBELLE.

By G. E. LaBELLE. [9]

[Exhibit "B" to Stipulation Regarding Objections to Claim of Berry Brothers—Letter, Dated November 16, 1912, Berry Brothers, Ltd., to W. P. Fuller & Co.]

November 16, 1912.

W. P. Fuller & Co.,
Seattle, Washington.

Gentlemen:

Inasmuch as you have interposed certain objections to the taking possession by *use* of certain goods heretofore delivered by us to Graves & LaBelle, and which goods we claim we delivered by virtue of a consignment agreement between ourselves and Graves & LaBelle, and inasmuch as you claim that the creditors of Graves & LaBelle will be entitled to these goods, or their value, in case of bankruptcy proceedings, we hereby agree that if you waive your objections and allow Graves & LaBelle to return these goods to us at this time, we will, in case of bankruptcy proceedings within four months from date, permit the question of our right to the possession of the goods to be submitted to the bankruptcy court of this district, and that we will, if in such event ordered to do so by said court, turn the said goods over to the Trustee in bankruptcy.

Yours very truly,
BERRY BROTHERS, LIMITED,
By R. L. HILTON,
Agent.

[Endorsed]: Stipulation. Filed May 21, 1913, 3 P. M. John B. Hoyt, Referee. Filed in the United

States District Court, Western District of Washington. Jun. 5, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [10]

[Trustee's Exhibit "A"—Balance Sheet, Dated October 31, 1913, of Federal Paint and Wall Paper Co.]

FEDERAL PAINT AND WALL PAPER CO.

BALANCE SHEET.

October 31st, 1912.

ASSETS:

Cash on hand.....	\$ 70.36	
Cash in bank.....	20.60	
Cash deposits....	65.00	
Accounts receivable.....	6,208.06	6,364.02

Merchandise—Inventory....	15,596.77	
Fixtures and Equipment—Inventory	2,750.00	
Insurance—Unexpired	57.45	

Total Assets.....	24,768.24	
Deficit (Excess of Liabilities over Assets).....	3,190.49	
	<u>27,958.73</u>	

LIABILITIES:

Notes payable.....	3,725.00	
Accounts payable....	23,976.44	
Labor—Unpaid.....	23.63	
Salaries “	133.66	
Rent “	100.00	
	<u>27,958.73</u>	

[Endorsed]: Trustee's Exhibit "A." Filed May 21, 1913, 3 P. M. John P. Hoyt, Referee. Filed U. S. District Court, Western District of Washington, June 5, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [11]

[Claimant's Exhibit 1—Letter, Dated March 29, 1912, Berry Brothers, Ltd., of Detroit, Mich., to Berry Brothers, San Francisco, Cal.]

MEMORANDUM.

Address all correspondence to the house.

In your Reply refer to No. 70.

From

Berry Brothers, Limited.

Varnish Manufacturers,

Shellac Bleachers

and Refiners of Wood Alcohol.

Detroit, March 29th, '12.

To Messrs. Berry Brothers, Ltd.,

San Francisco, Calif.

Gentlemen:

We are this day shipping a car of Varnish for Graves & LaBelle, Seattle, to be placed in storage for us. The car no. is M. St. P. & S. S. M. 28304, and is routed M. C., C. G. W. & G. N.

We trust same will reach them promptly and in good condition.

Yours very truly,

BERRY BROTHERS, LIMITED.

M. F.

per D. STEWART. [12]

[Claimant's Exhibit 1—Letter, Dated May 3, 1912,
Graves & LaBelle to Berry Brothers.]

GRAVES AND LA BELLE.

JOBBERS.

414 Union Street.

Seattle, Wash.

Paints

Oils

Glass and

Wallpapers

Berry Brothers, Ltd.,

San Francisco, Cal.

Painters

Paper-hangers

and

Janitor's Supplies

Gentlemen:

You may credit the account of Henry Bender with 12 gal. Elastic Interior Finish which we were able to get for him. Charge same to out warehouse account.

If Mr. Bender is still in error and we can assist you, call on us.

Thanking you, we are,

Yours very truly,

GRAVES & LA BELLE.

GEL.

GELB. 5/3/12

P. S.—Charge us with the following goods, drawn by us from warehouse stock in April:

1 case Liquid Granite in 4s

1 “ Orange Shellac “ “

1 “ White “ “ “

3 “ B Japan “ 5's

1 “ Liquid Granite “ 1's

[Claimant's Exhibit 1—Letter, Dated June 10, 1912,
Graves & LaBelle to Berry Bros., Ltd.]

GRAVES AND LA BELLE.

JOBBER.

414 Union Street.

Seattle, Wash.

Paints

Oils

Glass and

Wallpapers

Berry Bros., Ltd.,

San Francisco, Cal.

Painters

Paper-hangers

and

Janitor's Supplies

Gentlemen:

Charge our account with the following:

1 case of Crescent Hard Oil.....	1s
1 " " " "	1/2
1 " " " "	4
1 " Apex Paint & Varnish Remover..	1
1 " " " " " ..	1/2
1 " " " " " ..	4
1 " Liquid Granite.. ..	1
1 " " "	1/2
1 " " "	4
1 " Gloss Coach.....	1/2
1 " Bronzing Liquid.....	4
1 " " "	8
1 " B Japan.....	1
1 " "	1/2
25 Gal. Gloss Coach	5/5
5 " B Japan....	1/5

We are enclosing invoice for storage on 543 cases
\$16.29.

Yours truly,
GRAVES & LA BELLE.

GELB. 6/10/12

L. [14]

[Claimant's Exhibit 1—Letter Dated April 27, 1912,
Graves & LaBelle to Berry Bros., Ltd.]

GRAVES AND LA BELLE.

JOBBER.

414 Union Street.

Seattle, Wash.

Paints

Painters

Oils

Paper-hangers

Glass and

and

Wallpapers

Janitor's Supplies

Berry Bros., Ltd.,

San Francisco, Cal.

Gentlemen:

We are checking up a car of assorted goods arriving yesterday and find no advertising matter with the exception of 1 doz. sheet iron signs, and the Shingle Stain will surely be a dead stock without a color card. We should have a large number of shingle sets to distribute to architects, etc.

We will send you a warehouse slip in a day or so. Attend to the advertising matter at once.

Thanking you, we are,

Yours very truly,
GRAVES & LA BELLE.

GEL.

GELB. 4/27/12 [15]

**[Claimant's Exhibit 1—Letter, Dated April 22, 1912,
Berry Brothers, Ltd., to Graves & LaBelle.]**

April 22nd, 1912.

Graves & LaBelle,
Seattle, Wash.

Gentlemen:

We understood from our Mr. C. H. Adams that you would send us on the first of each month a memorandum of all stock sold so that this could be billed to you in accordance with our Contract.

Mr. Adams has been out of the city for a week or ten days and we are writing you direct to save time in case this matter has been overlooked. If the list was sent us, kindly mail us a duplicate as the original has failed to *reached* us.

Yours very truly,
BERRY BROTHERS, LTD.

THG/LEF.

Office Mgr.

[Endorsed]: Claimant's Exhibit 1. Filed May 21, 1913, 3 P. M. John P. Hoyt, Referee. Filed U. S. District Court, Western District of Washington, June 5, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [16]

[Order of Referee in Bankruptcy Sustaining Objections to and Disallowing Claim of Berry Bros.]

This matter coming on duly and regularly to be heard upon the objections of the trustee to the claim of Berry Bros., and the Court having considered the stipulation with reference to the facts in the case and

having heard the evidence introduced by the trustee, and having heard the arguments of counsel, and it appearing to the Court that said objections to the claim of Berry Bros. are well taken,

NOW, THEREFORE, IT IS ORDERED, that the objections to the said claim be sustained and that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

Dated at Seattle, Washington, this 2d day of June, 1913.

JOHN P. HOYT,
Referee.

[Endorsed]: Order Expunging Claim of Berry Brothers. Filed June 2, 1913, 11 A. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. June 5, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [17]

**Stipulation as to Testimony Presented at the
Hearing of Objections to the Claim of Berry
Brothers.**

It is hereby stipulated by and between the trustee for the bankrupts herein, and Berry Brothers, claimants, acting through their respective counsel, that besides the facts hereinbefore stipulated, testimony was taken before the Referee at the hearing of the objections to the claim of said Berry Brothers which was in substance as follows:

[Testimony of F. D. Seymour, for Trustee.]

F. D. SEYMOUR, being called as a witness in behalf of the trustee, after having been duly sworn, testified that he is the manager of W. P. Fuller & Co., of Seattle, Washington, and has been such for several years last past; that for a period of several months preceding the date of the filing of the petition in voluntary bankruptcy of the bankrupts herein, he was well acquainted with the affairs and financial condition of the said bankrupts; that on the 16th day of November, 1912, and for some time prior thereto, the said bankrupts were insolvent; that the statement hereto attached and marked trustee's Exhibit "A," is the statement delivered to said witness by said bankrupts before the said 16th day of November, 1912, which statement was prepared by the bankrupts and was delivered to the witness as a statement of the financial condition of the bankrupts; that the witness believed said statement to be a true and correct statement of the financial condition of said bankrupts on the date named in said exhibit; that the merchandise received by the bankrupts from Berry Brothers, and warehoused at Seattle at that time, was included in the said statement as a portion of the assets of said bankrupts, the same being the identical merchandise which was thereafter retaken by said Berry Brothers; that on or about November 1, 1913, at the request of some of the creditors of [18] Graves & LaBelle, he undertook to superintend the business of said Graves & LaBelle, and in such capacity all matters pertain-

ing to their business were referred to him; that on or about November 16, 1912, Berry Brothers, through their agent, R. L. Hilton, informed him that said Berry Brothers was desirous of obtaining possession of certain goods in the warehouse of said Graves & LaBelle, which had, previous to said date, been shipped to Graves & LaBelle by Berry Brothers; that he informed said Hilton that the creditors of said bankrupts were entitled to said goods. But in order to prevent litigation said Berry Brothers were allowed to retake said goods upon the conditions set forth in the letter attached to the first stipulation herein between said Berry Brothers and the trustee, and with a further understanding that the creditors waived no rights by allowing the return of said goods, and that in case of bankruptcy proceedings the trustee was to be regarded as in the same position as though he had such goods in his possession. The aforesaid statement marked Trustee's Exhibit "A" was then by the trustee offered in evidence. All the foregoing testimony was objected to by said Berry Brothers on the grounds that it was immaterial and irrelevant.

Five letters pinned together and marked Claimant's Exhibit "1" were thereupon offered in evidence in behalf of the claimant Berry Brothers.

It is further agreed and stipulated by the parties hereto, as facts to be considered by the Court in the above-entitled matter, that each time goods were withdrawn by the said Graves & LaBelle from the stock in their warehouse of the goods shipped them by said Berry Brothers under and by virtue of the

agreement marked Exhibit "A," and attached to the original stipulation of facts herein, that said goods were, upon being so withdrawn, taken to the salesrooms of said Graves & LaBelle, [19] which were separate from said warehouse and at a distance of several blocks therefrom, and that the claim of said Berry Brothers herein amounting to \$1,861.50, objected to by the trustee, is for the goods having been removed to the salesrooms as aforesaid, and that none of such goods were retaken by said Berry Brothers. It is also stipulated that the goods shipped by Berry Bros. arrived at Graves & LaBelle's warehouse in Seattle in March, 1912, and were not included by Graves & LaBelle as an asset until Oct. 31, 1912, and then without the knowledge and consent of Berry Brothers.

McCLURE & McCLURE,

Attorneys for Trustee.

FRANK E. GREEN,

Attorney for Berry Brothers. [20]

[Endorsed]: Stipulation as to Testimony Presented at the Hearing of Objections to the Claim of Berry Brothers. Filed June 4, 1913, 2 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Jun. 5, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [21]

**Petition to Review Order of Referee Sustaining
Objections to, and Expunging the Claim of
Berry Brothers.**

To the Honorable EDWARD E. CUSHMAN, Judge
of the District Court of the United States for
the Western District of Washington:

The petition of Berry Brothers, a corporation,
under the laws of the State of Michigan, one of the
creditors of the aforesaid bankrupts, respectfully
represents that manifest error to the prejudice of
this complainant was made by the Referee in said
matter in the findings and conclusions entered herein
on the 26th day of May, 1913, and in the order sus-
taining the objections to, and disallowing and ex-
punging the claim of said corporation against said
bankrupts from the list of allowed claims upon the
trustee's record in said case, which said order was
entered on the 2d day of June, 1913.

The errors complained of are:

1. Said Referee erred in finding from the evi-
dence that this claimant had, shortly before the ad-
judication of bankruptcy, received from the bank-
rupts merchandise of the value of more than
\$3,000.00.
2. Said Referee erred in finding that at the time
the aforesaid merchandise was taken by this claim-
ant, the bankrupts were insolvent and said fact was
known to this claimant.
3. Said Referee erred in finding that the title to
the aforesaid merchandise passed from this claimant,
as to creditors [22] of the bankrupts, to the trus-

tee who now represents the bankrupts.

4. Said Referee erred in finding that the delivery of the aforesaid merchandise to the possession of the bankrupts conveyed absolute title thereto to the bankrupts so far as the rights of creditors are concerned.

5. Said Referee erred in finding that the bankrupts had entire control of the aforesaid merchandise with the absolute right to sell any part, of the whole thereof, at any time they might elect so to do.

6. Said Referee erred in finding that the taking of the merchandise in question was prejudicial to the rights of creditors, and constituted a preference.

7. Said Referee erred in finding that this claimant must surrender the aforesaid merchandise before the claim presented by this claimant can be allowed.

8. Said Referee erred in his conclusions of law from the evidence offered at said hearing.

WHEREFORE, the said Berry Brothers prays that it may be decreed by the Court to have its claim against said bankrupts' estate allowed for the full amount thereof, and that it be restored to all things lost by reason of the finding and order of the Referee in said matter.

BERRY BROTHERS.

By FRANK E. GREEN,

Its Attorney.

Copy of within Petition received and service of the same acknowledged this 3d day of June, 1913.

McCLURE & McCLURE,

Attorneys for Trustee.

[Endorsed]: Petition to Review Order of Referee Sustaining Objections to, and Expunging the Claim of Berry Brothers. Filed June 4, 1913, 2 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Jun. 5, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [23]

Opinion on Review of Referee's Decision.

CUSHMAN, District Judge.

This matter is before the Court for a review of the Referee's decision sustaining objections to the claim of Berry Bros., a corporation, one of the creditors, the objections being made upon the ground that this creditor had obtained an unlawful preference by re-taking certain goods of the bankrupt within four months of the filing of the petition herein for adjudication, by the bankrupts.

Under the claim made by Berry Brothers, these goods were delivered to the bankrupt under a contract providing:

“Agreement between Berry Brothers, Limited, of Detroit, Michigan, Party of the First Part, and Graves & LaBelle of Seattle, Washington, Party of the Second Part;

“The Party of the Second Part hereby agree to store such goods that the Party of the First Part may ship on consignment to the Party of the Second Part for the purpose of Sale by said Graves & LaBelle.

“The Party of the First Part agree to pay the

Party of the Second Part the cost of cartage in Seattle from the car to their Warehouse of each consignment of goods, and 3¢ per case per month for Storage based on the Stock on hand at the first of each month.

“The Party of the First Part will carry and pay for such Insurance as they deem necessary for the goods on consignment.

“The Party of the First Part will render a Memo Invoice to the Party of the Second Part of all goods shipped on consignment and will credit to such consignment account the amount of goods that are sold each month from said Stock, and the Party of the Second Part agree to pay for such goods, sold by them, or taken from consigned goods while in their possession on the Terms which they are billed by the Party of the First Part on their regular Invoice.

“It is also agreed that this Contract can be terminated at any time upon thirty days’ written notice from either Party.”

Upon this contract and stipulated facts, the Referee decided: [24]

“The stipulation of the parties and the undisputed proofs showed that the claimant had shortly before the adjudication of bankruptcy received from the bankrupt merchandise of the value of more than \$3,000.00; that at the time the merchandise was so taken by the claimant the bankrupts were insolvent and the fact known to the claimant; that the goods so taken had been furnished to the bankrupts under a contract made between the parties on the 18th day of March, 1912. It was agreed by the claimant that the

taking of such goods from the possession of the bankrupts or their voluntary trustee should not affect the rights of the parties, but that the question as to whether these goods were the property of the bankrupts or of the claimant should be determined in the Bankruptcy Court the same as it might have been had the goods gone into the possession of the trustee in bankruptcy. The substantial question to be decided is as to whether or not under the contract in question the title to the goods delivered by the claimant to the bankrupts in pursuance thereof so passed to the bankrupts that the trustee in said bankruptcy had the right to them as against said claimant. As between the parties it is clear that the title to the merchandise did not pass, but in the opinion of the Referee such title did pass as to creditors of the bankrupts and the trustee who now represents them. The contract in question presents some feature not heretofore considered in this Court, but when taken as a whole the Referee is of the opinion that its interpretation comes within rules heretofore announced in this District, and that thereunder it must be held to have conveyed absolute title to the bankrupts so far as the rights of creditors are concerned. The bankrupts had entire control of the merchandise, with the absolute right to sell any part or the whole thereof at any time they might elect so to do. Such sales to be made in their own name and at any price which they might see fit to charge, and with no provision whatever that the particular funds derived from each sale should become the property of the claimant. It being only required that they should

render an account of such sales and pay for the goods sold during the preceding month, when billed to them by the claimant. This being so the Referee is unable to find that the secret agreement between the claimant and the bankrupts requiring claimant to pay freight and storage charges should in any way affect the question of the change of title as to creditors.

“It follows that in the opinion of the Referee, the taking of the merchandise in question was prejudicial to the rights of creditors and constituted a preference which must be surrendered before the claim in question can be allowed.

“An order will be made and entered sustaining the objections and expunging the claim.

“Dated at Seattle, in said District, this 26th day of May, 1913.”

GATES & EMERY, McCLURE & McCLURE,
for Trustee.

FRANK E. GREEN, for Claimant, Berry Brothers. [25]

The Trustee relies upon the following authorities:

5 Cyc. 169;

35 Cyc. 28;

1 Loveland on Bankruptcy, 832;

12 Cyc. 628, 644;

Re Penny & Anderson, 23 A. B. R. 115;

Re Hassam, 18 A. B. R. 745; 153 Fed. 932.

Claimant relies upon the following authorities:

Hunt vs. Wyman, 100 Mass. 198;

Strum vs. Boker, 150 U. S. 312;

Guss vs. Nelson, 200 U. S. 298;

Rumpf vs. Bartow, 10 Wash. 382;

Peterson vs. Woolery, 9 Wash. 390;

Columbus Buggy Co., 143 Fed. 859;

Wood Mowing & Reaping Mach. Co. vs. Van-story, 171 Fed. 375;

Southern Hdwe. & Supp. Co. vs. Clark, 201 Fed. 1;

L. C. Smith & Bros. Typewriter Co. vs. Alleman, 199 Fed. 1;

In re Marx Tailoring Co., 28 A. B. R. 147.

The order of the Referee is confirmed. While the arrangement between the creditor and the bankrupt was not an ordinary sale, yet as to the creditors, if not an absolute sale, it was a conditional one, requiring recording as against creditors. The contract and stipulated facts show that as a bailment it was merely colorable.

[Endorsed]: Opinion on Review of Referee's Decision. Filed in the United States District Court, Western District of Washington. June 27, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy.
[26]

Order Confirming Decision of Referee.

The above matter coming on duly and regularly to be heard upon the petition of Berry Bros., claimant, for a review of the Referee's decision sustaining objections to the claim of Berry Bros., a corporation, one of the creditors in the above-entitled matter, the said objections being made upon the ground that said creditor obtained an unlawful preference by retaking certain goods of the bankrupts within four months of the filing of the petition herein for adjudication by

the bankrupts, and said matter having been duly argued before the Court on the 9th day of June, 1913, and the Trustee being represented by Gates & Emory, and McClure & McClure, his attorneys, and the claimant being represented by Frank E. Green, its attorney, and the Court having heard the arguments of counsel, and having duly considered the matter, and having heretofore and on June 27, 1913, filed his memorandum of decision herein,

NOW, THEREFORE, by virtue of the law and reason in the premises, IT IS ORDERED AND ADJUDGED, that the said decision of the Referee sustaining the objections to said claim of Berry Bros., a corporation, be and the same is hereby in all things approved and confirmed.

Done in open court this 3d day of July, 1913.

EDWARD E. CUSHMAN,

Judge. [27]

Due and timely service of within order this 2d day of July, 1913, and receipt of a copy thereof, admitted.

FRANK E. GREEN,

Attorney for Berry Brothers.

[Endorsed]: Order Confirming Decision of Referee. Filed in the United States District Court, Western District of Washington. Jul. 3, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy.
[28]

Petition for Appeal.

PETITION ON APPEAL OF BERRY BROTHERS, A CORPORATION, CLAIMANT.

The above-named Berry Brothers, claimant, con-

sidering itself aggrieved by the decision made and entered on the 27th day of June, 1913, and the judgment made and entered on the 3d day of July, 1913, in the above-entitled cause confirming the order of the Referee expunging the claim of this claimant, does hereby appeal from such decision and such judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Error, which is filed herewith, and it prays that this appeal may be allowed, and that transcript of the record, proceedings and papers upon which said decision and judgment were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

FRANK E. GREEN,

Attorney for Berry Brothers, Claimant.

Copy of within Petition received and service of the same acknowledged this 7th day of July, 1913.

McCLURE & McCLURE and

GATES & EMERY,

Attorneys for Trustee.

[Endorsed]: Petition on Appeal of Berry Brothers, a Corporation, Claimant. Filed in the United States District Court, Western District of Washington. Jul. 7, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [29]

Assignment of Error on Appeal.

And now on the seventh day of July came the said Berry Brothers, a corporation, a creditor of the above-named bankrupts, and say that the decision

and judgment order in said cause are erroneous and against the just rights of said creditor of said bankrupts for the following reasons:

1. Because the stipulated facts and evidence show that the claim of said Berry Brothers should have been allowed as a valid debt against the estate of the bankrupts.

2. Because the stipulated facts and evidence show that as to the goods retaken by Berry Brothers from the warehouse of the bankrupts, November 16, 1912, did not constitute an unlawful preference within four months of the filing of the petition herein for adjudication by the bankrupts.

3. Because the stipulated facts and evidence herein show that the goods retaken by Berry Brothers, November 16, 1912, from the warehouse of the bankrupts were not a conditional sale requiring record as against creditors.

4. Because the stipulated facts and evidence herein show that the goods retaken by Berry Brothers, November 16, 1912, from the warehouse of the bankrupts were not a colorable [30] bailment, but that while said goods remained in said warehouse were in fact and law a bailment.

5. Because there is no evidence, stipulated or otherwise, showing that the retaking of the goods in the warehouse November 16, 1912, by Berry Brothers, constituted a preference to Berry Brothers, or prejudiced the rights of any other creditor of the bankrupts.

6. Because the stipulated facts and evidence herein show that the order of the Referee disallowing the claim of Berry Brothers and expunging the same

from the records of the Trustee on the objections of the Trustee, should have been reversed.

7. Because the stipulated facts and evidence herein show that the decision and judgment order should have been in favor of this creditor of the above-named bankrupts and against the Trustee of the above-named bankrupts.

WHEREFORE, the said creditor and claimant of the above-named bankrupts prays that said decision and judgment order and decree be reversed, and that said District Court may be directed to enter a decree and judgment allowing said claim of said creditor, Berry Brothers, as a proved debt against the estate of the bankrupts.

FRANK E. GREEN,

Attorney for Said Creditor and Claimant Berry Brothers.

Copy of within assignment received and service of the same acknowledged this 7th day of July, 1913.

GATES & EMERY and
McCLURE & McCLURE,

Attorneys for Trustee.

[Endorsed]: Assignment of Error on Appeal. Filed in the United States District Court, Western District of Washington. Jul. 7, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [31]

[Order Granting Appeal and Fixing Amount of Bond on Appeal.]

ORDER GRANTING APPEAL OF BERRY BROTHERS, CLAIMANT.

The claimant, Berry Brothers, having heretofore

filed herein its petition for appeal and assignment of error, and having given notice to the Trustee in the above-entitled cause, and the said Trustee being represented by his attorneys, Gates & Emery and McClure & McClure, said appeal is allowed to said petitioner upon the execution of a cost bond in the sum of Two Hundred and Fifty Dollars (\$250.00).

The GLOBE INDEMNITY COMPANY of New York is accepted on said bond as surety, and said bond is now approved.

Dated at Seattle, Washington, this 7th day July, 1913.

EDWARD E. CUSHMAN,
District Judge.

Copy of within Order received and service of the same acknowledged this 7th day of July, 1913.

GATES & EMERY and
McCLURE & McCLURE,
Attorneys for Trustee.

[Endorsed]: Order Granting Appeal of Berry Brothers, Claimant. Filed in the United States District Court, Western District of Washington. Jul. 7, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [32]

Bond for Costs on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Berry Brothers, a corporation of the State of Michigan, a claimant in the above-entitled cause, as principal, and Globe Indemnity Company, a corporation organized under the laws of the state of

New York, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto R. B. Snowdon as Trustee in bankruptcy in the above-entitled cause in the just and full sum of Two Hundred and Fifty Dollars (\$250.00), to be paid to the said R. B. Snowdon, Trustee, or his successors, to which payment well and truly to be made, we bind ourselves, our assigns and successors, jointly and severally by these presents.

Sealed with our seal and dated this 7th day of July, in the year of our Lord one thousand nine hundred and thirteen.

The condition of this obligation is such that whereas, the claim of the above-named claimant, Berry Brothers, as a creditor of the above-named bankrupts, was by the Referee in bankruptcy in the above-entitled court on the second day of June, 1913, on objections by the Trustee in said cause, disallowed and ordered expunged from the list of claims upon the Trustee's record in said cause, and

Whereas, on the 27th day of June, 1913, the above-entitled court in a decision filed in said cause and in an order of judgment filed in said cause on the 3d day of July, 1913, confirmed the decision of said Referee and sustained the objections to said claim of said claimant, and

Whereas, the above-named principal, Berry Brothers, having obtained an appeal and filed a copy thereof in the clerk's office of the said court, from said decision and judgment of [33] said District

Court to the United States Circuit Court of Appeals for the Ninth Circuit,

NOW, THEREFORE, if the said Berry Brothers shall prosecute its appeal to effect and answer all costs and damages that may be awarded against it on said appeal, if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

BERRY BROTHERS.

By FRANK E. GREEN,
Its Attorney.

GLOBE INDEMNITY COMPANY.

By L. V. BREWER,
Resident Vice-President.

[Seal] Attest: A. H. KENAGA,
Resident Assistant Secretary.

Approved this 7th day of July, A. D. 1913, by
EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Bond for Costs on Appeal. Filed in the United States District Court, Western District of Washington. Jul. 7, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [34]

Citation [on Appeal (Copy)].

To R. B. Snowdon, as Trustee in Bankruptcy of the
Above-named Bankrupts, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco in the State of California, within thirty days after the date of this citation pur-

suant to a petition on appeal and assignment of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, in the above-entitled matter in which Berry Brothers is claimant, to show cause, if any there be, why the judgment rendered in said cause confirming the order of the Referee in Bankruptcy disallowing and expunging the claim of said Berry Brothers, as in said petition of appeal mentioned, should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. EDWARD DOUGLASS WHITE, Chief Justice of the United States, this eighth day of July, 1913.

[Seal] EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington.

Copy of the foregoing citation on appeal received and due service thereof acknowledged this 8th day of July, 1913.

GATES & EMERY and
McCLURE & McCLURE,
Attorneys for R. B. Snowdon, Trustee.

[Endorsed]: No. 5030. In the District Court of the United States for the Western District of Washington, Northern Division. In the Matter of Edwin L. Graves and George E. LaBelle, et al., Bankrupts. Berry Brothers, Claimant. Citation. Filed in the United States District Court, Western District of Washington. Jul. 10, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. Frank E.

Green, Attorney for Claimant, P. O. Address: Suite 230 Burke Building, Seattle, King County, Wash.
[35]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 39 typewritten pages numbered from 1 to 39, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, exhibits and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of this cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for in Praecipe by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the transcript of the record on appeal in the above-entitled cause from the District Court of the United States for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the claimant and appellant for the preparation and certification of the typewritten transcript

of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [36]

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905) for making transcript of the record for printing purposes, 76 folios at 20c per folio.....	\$15.20
Certificate to certified copy of type- written transcript of record.....	.30
Seal to said certificate.....	.40
	<hr/> \$15.90

I hereby certify that the above cost for preparing and certifying record amount to \$15.90 has been paid to me by Frank E. Green, Esq., attorney for claimant and appellant.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District this *th* day of July, 1913.

[Seal]

FRANK L. CROSBY,
Clerk. [37]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 5030.

In the Matter of EDWIN L. GRAVES and
GEORGE E. LaBELLE, Copartners as
GRAVES & LaBELLE and FEDERAL
PAINT & WALL PAPER CO., and EDWIN
L. GRAVES, Individually, and GEORGE E.
LaBELLE, Individually,
Bankrupts.

Citation [on Appeal (Original)].

To R. B. Snowdon, as Trustee in Bankruptcy of the
Above-named Bankrupts, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco in the State of California, within thirty days after the date of this citation pursuant to a petition on appeal and assignment of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, in the above-entitled matter in which Berry Brothers is claimant, to show cause, if any there be, why the judgment rendered in said cause confirming the order of the Referee in Bankruptcy disallowing and expunging the claim of said Berry Brothers, as in said petition of appeal mentioned, should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. EDWARD DOUGLASS WHITE, Chief Justice of the United States, this eighth day of July, 1913.

[Seal] EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington.

Copy of the foregoing Citation on Appeal received and due service thereof acknowledged this 8th day of July, 1913.

GATES & EMERY and
McCLURE & McCLURE,
Attorneys for R. B. Snowdon, Trustee. [38]

[Endorsed]: No. 5030. In the District Court of the United States for the Western District of Washington, Northern Division. In the Matter of Edwin L. Graves and George E. LaBelle et al., Bankrupts. Berry Brothers, Claimant. Citation. Filed in the United States District Court, Western District of Washington. Jul. 10, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [39]

[Endorsed]: No. 2286. United States Circuit Court of Appeals for the Ninth Circuit. Berry Brothers, a Corporation, Appellant, vs. R. B. Snowdon, as Trustee in Bankruptcy of Edwin L. Graves and George E. LaBelle, Copartners as Graves & LaBelle and Federal Paint & Wall Paper Co., and Edwin L. Graves, Individually, and George E. LaBelle, Individually, Bankrupts, Appellee. In the Matter of Edwin L. Graves and George E. LaBelle, Copartners as Graves & LaBelle and Federal Paint & Wall Paper Co., and Edwin L. Graves, Individually, and George E. LaBelle, Individually. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Received July 15, 1913.

F. D. MONCKTON,
Clerk.

Filed July 17, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

2

**In the United States Circuit Court
of Appeals for the
Ninth Circuit**

BERRY BROTHERS, a corporation,
Appellant,

vs.

R. B. SNOWDON, as Trustee in
Bankruptcy,

Appellee,

In the Matter of EDWIN L. GRAVES
and GEORGE E. LaBELLE, co-
partners as GRAVES & LaBELLE,
and FEDERAL PAINT & WALL
PAPER COMPANY, and EDWIN
L. GRAVES, individually, and
GEORGE E. LaBELLE individu-
ally, Bankrupts.

No. 2286.

**APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION**

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment order of the District Court of Western Washington confirming an order of the referee in bankruptcy disallowing

and expunging the claim of appellant, Berry Brothers, against the bankrupts.

The appellant is a corporation of the State of Michigan, with its principal offices and manufacturing plant at Detroit, and is engaged in the manufacturing and wholesaling of varnish and allied products. On March 18, 1912, appellant and bankrupts entered into a written agreement (Trans., pp. 8-9), whereby the bankrupts agreed to store in their warehouse in Seattle such goods as appellant would ship them from time to time. Appellant agreed to pay the freight, cartage, monthly warehouse charges, and to keep the stock of goods so stored, insured for its own protection. Under this agreement a stock of goods amounting to approximately \$5,000.00 was shipped by appellant to bankrupts, and upon arrival in Seattle in March, 1912 (Trans., p. 20), appellant paid the freight, and cartage from the cars to bankrupts' warehouse, and thereafter paid storage to bankrupts monthly for the goods so stored, and kept the goods insured for its own protection (Trans., p. 6). On various occasions while appellant's goods were stored in bankrupts' warehouse, appellant withdrew portions of the stock and sold it independently of the bankrupts, with their knowledge and without objection on their part (Trans., pp. 6-7). By virtue of the

agreement, bankrupts were permitted to remove goods to sell from the stock so stored, provided that at the end of each month they reported to appellant the amount of goods so withdrawn from their warehouse, and appellant would thereupon render an invoice to bankrupts for goods so removed. There were other goods of bankrupts in the same warehouse, but there is no evidence tending to show that the goods stored for appellant were in any manner intermixed with other goods. Each time the bankrupts removed any of appellant's goods from the warehouse, the goods were taken to the salesrooms of the bankrupts, which were situated several blocks away from the warehouse (Trans., p. 20). Bankrupts included appellant's stored goods as an asset in a financial statement issued October 31, 1912, but did so without the knowledge or consent of appellant, and had not done so before that date, though the goods had been in their possession since March, 1912 (Trans., p. 20). By November 16, 1912, goods to the amount of \$1,861.50 had been removed from the warehouse to bankrupts' salesrooms, and had in due course been invoiced and charged by appellant to the bankrupts (Trans., p. 20). On this latter date, appellant desiring to withdraw the goods remaining in the bankrupts' warehouse, and objection being made by a creditor of the

bankrupts to such withdrawal, appellant agreed with the objecting creditor that if bankruptcy proceedings result within four months from said date, appellant would permit the question of its right to withdraw said goods from bankrupts' warehouse to be adjudicated in such bankruptcy proceedings; whereupon appellant withdrew the goods then remaining in bankrupts' warehouse, amounting to approximately \$3,000.00.

In due course, after bankruptcy proceedings were instituted (February, 1913), appellant filed its claim of \$1,861.50 for the goods removed by the bankrupts from their warehouse to their salesrooms, which goods had been invoiced and charged to the bankrupts. To this claim the trustee for the bankrupts filed objections (Trans., pp. 4-5) on the ground that the withdrawal by appellant of the goods remaining in bankrupts' warehouse November 16, 1912, constituted a preference over the other creditors. The referee sustained the trustee's objections, and on petition for review to the District Court the referee's order was confirmed, from which judgment order or decree this appeal is prosecuted.

ASSIGNMENT OF ERRORS.

The court erred:

1. Because the stipulated facts and evidence

show that the claim of said Berry Brothers should have been allowed as a valid debt against the estate of the bankrupts.

2. Because the stipulated facts and evidence show that as to the goods retaken by Berry Brothers from the warehouse of the bankrupts, November 16, 1912, did not constitute an unlawful preference within four months of the filing of the petition herein for adjudication by the bankrupts.

3. Because the stipulated facts and evidence herein show that the goods retaken by Berry Brothers, November 16, 1912, from the warehouse of the bankrupts were not a conditional sale requiring record as against creditors.

4. Because the stipulated facts and evidence herein show that the goods retaken by Berry Brothers, November 16, 1912, from the warehouse of the bankrupts were not a colorable bailment, but that while said goods remained in said warehouse were in fact and law a bailment.

5. Because there is no evidence, stipulated or otherwise, showing that the retaking of the goods in the warehouse November 16, 1912, by Berry Brothers, constituted a preference to Berry Brothers, or prejudiced the rights of any other creditor of the bankrupts.

6. Because the stipulated facts and evidence herein show that the order of the referee disallowing the claim of Berry Brothers and expunging the same from the records of the trustee on the objections of the trustee, should have been reversed.

7. Because the stipulated facts and evidence herein show that the decision and judgment order should have been in favor of this creditor of the above named bankrupts and against the trustee of the above named bankrupts.

ARGUMENT.

This case was heard by the referee in bankruptcy on stipulated facts (Trans., pp. 6-10) and the testimony of one witness in behalf of the trustee (Trans., pp. 18-19) and certain exhibits offered in evidence (Trans., pp. 11-16). The testimony by the witness in behalf of the trustee tends to show that on November 16, 1912, the bankrupts were insolvent; that appellant knew of this insolvency at the time the stored goods were withdrawn by appellant from the bankrupts' warehouse; that in a financial statement prepared by the bankrupts October 31, 1912, the stored goods of appellant were included in said statement. All this testimony was objected to by appellant on the grounds that it was

immaterial and irrelevant (Trans., p. 19). In this argument we shall urge two principal points, either of which we submit is sufficient to reverse the lower court.

I.

APPELLANT'S GOODS WHILE STORED IN BANKRUPTS' WAREHOUSE CONSTITUTED A BAILMENT, AND WERE NOT SUBJECT TO LIENS OF BANKRUPTS' CREDITORS.

Under the amendment by Congress of June 25, 1910, to the Bankruptcy Act, the trustee in bankruptcy is vested with rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, and therefore the right of appellant to withdraw the goods from the bankrupts' warehouse November 16, 1912, must be determined by the rights of bankrupts' creditors to a lien on the goods at that time. If the bankrupts held the goods as bailors their creditors had no right of lien.

Counsel for the trustee argued in the lower court that the goods in question constituted a conditional sale, and by virtue of the local law a memorandum of such sale should have been filed with the county auditor within ten days from the time of delivery of the goods in order to preserve title in

appellant as against the bankrupts' subsequent creditors. This view seems to have been concurred in by the lower court. We submit, however, that on the facts in this case such a view is contrary to the decisions of the Supreme Court of the State of Washington.

In *Rumpf v. Bartow*, 10 Wash. 382, the court held that, where goods are delivered to a person under a memorandum agreement as follows:

“These goods are sent for your inspection, the property of Rumpf & Mayer, and to be returned to them within demand days. Sale only takes effect from date of their approval of your selection, and until then goods are held subject to their order.”

The transaction constitutes a bailment and not a conditional sale, and holds that this is true as well as to other innocent parties.

In *Peterson v. Woolery*, 9 Wash. 390, the court holds that the delivery of shingle bolts to a shingle manufacturer under a contract providing that title to the bolts was not to pass, and that payment therefor was to be at certain rate for shingles manufactured therefrom, does not constitute such a conditional sale of the shingle bolts as to require a record thereof to be made under the conditional sales statute of Washington in order to prevent the sale being treated absolute as to creditors.

The foregoing local cases are in harmony with the decisions of other courts, both federal and state:

In *Hunt v. Wyman*, 100 Mass. 198, the court makes the following distinction:

“An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return.”

The above distinction is quoted approvingly by the Supreme Court of the United States in *Sturm v. Boker*, 150 U. S. 312, and *Guss v. Nelson*, 200 U. S. 298. Applying this distinction to the present case, we clearly have an option by bankrupts to purchase any portion of the goods stored in their warehouse by appellant, by removing such portion from the warehouse to their salesrooms. In other words, as long as the goods remained in the warehouse they were there entirely at the cost and risk of appellant, and bankrupts could purchase any portion of such goods by complying with the agreement and in no other way, that is, by removing the goods from the warehouse and reporting the items so removed.

In re Columbus Buggy Co., 143 Fed. 859, we quote from the syllabus as follows:

“A contract between a furnisher of goods and the receiver that the latter may sell them at such

prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expenses of insurance, freight, storage and handling and that he will hold the merchandise unsold subject to the order of the furnisher, discloses an agreement of bailment for sale, and does not evidence a conditional sale. Such a contract is not affected by a statute which renders unrecorded contracts for conditional sales voidable by creditors and purchasers.”

In the foregoing case the court, in defining a contract of sale, says:

“An agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price, and the agreement of the latter to buy for and to pay the agreed price are essential elements of a contract of sale.”

Measuring the agreement between the bankrupts and the appellant now before this court, by the foregoing definition of a sales contract, which, by the way, has been adopted and quoted by several of the Circuit Courts of Appeal up to the present time, it becomes apparent at once that the agreement now before the court lacks the one essential of purchase. In other words, there is no agreement on the part of bankrupts to buy any of the goods that were stored by appellant in their warehouse. They simply had an option to buy, but had not bought, and were not bound to buy. Even the referee, in his findings, frankly admits that appellant could

not have maintained an action against the bankrupts for the goods remaining stored in the warehouse under this agreement.

A case quite similar to the one now before the court is *Wood Mowing & Reaping Mach. Co. v. Van-story*, 171 Fed. 375. The facts and conclusions are briefly stated in the first paragraph of the syllabus, as follows:

“Petitioner, a manufacturer of farm machinery, shipped machines by the carload to the bankrupt, which was a hardware company, under a contract by which the bankrupt received and stored the same and from time to time shipped machines out on orders from petitioner. The machines were not charged to the bankrupt, nor invoiced as part of its stock, but it was paid an agreed price for storage and transfer. It had the privilege of selling any of the same to its own customers, and machines, when so sold, were charged to it. At the end of the year an inventory was taken by petitioner of the machinery then on hand in storage. Held, that the transaction was a bailment, the title remaining in petitioner, and that on the bankruptcy it was entitled to reclaim possession of the machines on hand from the bankrupt’s trustee.”

In *Southern Hardware & Supply Co. v. Clark*, 201 Fed. 1, the court in part says:

“When the buyer is, by the contract, bound to do something as a condition precedent to the passing of the title to the property, the title will not pass till the condition is fulfilled, although the property is delivered into the possession of the buyer.

The buyer, in such case, acquires no property in the thing bought. He is only a bailee for a specific purpose. The delivery of possession, which, in ordinary cases, passes the title, can only have that effect when the condition is fulfilled—when, in a case like this, the purchase money is paid.”

In re Smith & Nixon Piano Co., 149 Fed. 111.

In re Galt, 120 Fed. 64.

Butler Bros. Shoe Co., vs. U. S. Rubber Co.,
156 Fed. 1.

Metropolitan Nat'l Bank vs. Benedict Co., 74
Fed. 182.

Counsel for appellee will no doubt argue that the foregoing cases were all decided before the amendment of June 25, 1910, but we submit that the distinction between a bailment and a conditional sale has in no way been changed by the amendment.

The written agreement of appellant and bankrupts as to the conditions under which these goods were delivered to the bankrupts, shows clearly by its terms that it was a contract of bailment, and as such the court should give it full force and effect against the trustee who stands in the position of a creditor.

In *L. C. Smith & Bros. Typewriter Co. v. Alleman*, 199 Fed. 1, the court in part says:

“While it is true that the mere use of the words ‘lease’ and ‘rental’ in a written agreement relating to personality, will not convert into a bailment what must otherwise be construed as a conditional sale, yet, even in a contest in which execution creditors

are concerned, if the contract by its terms is a bailment, the courts will give it its effect to the exclusion of the execution creditor.”

In the lower court counsel for appellee relied largely upon the case of *Penny & Anderson*, 23 A. B. R. 115, decided by Referee Stanley W. Dexter, but we submit that case is clearly distinguishable from the case now before this court. In that case at page 117, the agreement between the parties is set forth in full. Omitting unessential details, the agreement is as follows:

“This agreement made the 10th day of June, 1909, by and between James M. McCunn & Co., party of the first part, and Penny & Anderson, parties of the second part, witnesseth: .

“Whereas, the parties of the second part are about to open a restaurant with a bar at No. 152 Columbus Avenue, and whereas, the parties of the second part are unable to pay for said goods hereinafter described (here follows list of goods).

“The party of the first part agrees to stock the wine cellar of the parties of the second part * * * and in consideration of the foregoing it is agreed by and between the parties that the said wines and liquors shall be considered as placed at the premises No. 152 Columbus Avenue on consignment, and the title in and to said wines and liquors shall always be in the party of the first part until the full indebtedness to the party of the first part is paid and receipt in full therefor is given.

“It is also further agreed that the value of the

said wines and liquors hereby to be delivered under this agreement is \$945.65.”

It will be seen at a glance that by the above agreement Penny & Anderson agreed to purchase at a specified price, which are elements essential to a sale. By agreeing that the title was to remain in the vendors, it became a conditional sale. But the case now before the court is entirely different. Bankrupts did not agree to purchase any goods except as from time to time they removed goods stored in the warehouse, and thereby agreed to purchase such goods so removed. In addition to this, in the Penny & Anderson case the vendors of the goods did not pay storage for the goods, did not keep them insured to their own account, and there is nothing in the agreement indicating that the goods were stored, nor were the goods kept in a warehouse at a considerable distance from the goods displayed for sale by Penny & Anderson.

In re Marx Tailoring Co., 28 A. B. R. 147, we have a condition quite similar to the case now before this court, in which the amendment of June 25, 1910, is construed. For the sake of brevity we quote the facts and conclusions from the syllabus, as follows:

“Petitioner, upon closing out a tailoring business, entered into an agreement with bankrupt to handle as samples, on a commission basis, certain

piece goods which had constituted part of petitioner's stock in trade, the goods to be made up at petitioner's principal place of business when bankrupt could persuade his customers to consent. Petitioner was to pay taxes and insurance and be entitled to recall any of the goods at any time and all unsold goods at the end of the season. Goods damaged, while in bankrupt's possession, except by fire, were to be paid for by him. Bankrupt, moreover, was to have the privilege of using any of the piece goods to make up suits for customers who would not consent to have them made up by petitioner, and such goods as were so used were to be charged to bankrupt at twenty per cent above the list price, but he was not required to account to petitioner for the specific proceeds of the goods so used. Bankrupt used in this manner practically all of the piece goods disposed of by him at all, the remainder being in his possession when bankruptcy intervened. Held, that the conditional privilege of purchase did not convert the contract, which was otherwise one of bailment, into a contract of sale; and that since there was no sale until the privilege was exercised by the bankrupt, and then only as to the piece purchased in each instance, the goods which came into the hands of the bankrupt's trustee, as to which no option to purchase had been exercised by bankrupt prior to bankruptcy, were held by him as bailee, merely, and could be reclaimed by petitioner."

In the opinion which follows the court, in part, says:

"There is no doubt from the language and provisions of the written agreement that the intent of the parties to it was that the ownership of the goods was to remain in the petitioner, and this intent as between the parties will prevail unless the privilege granted the bankrupt of reselling is inconsistent

with such retention of ownership when the rights of subsequent creditors who may be presumed to have extended credit to the bankrupt on the faith of his apparent ownership of goods so placed in his possession prevents. * * * While the bankrupt's privilege to purchase existed from the time the contract was executed and might be exercised without limit so as to exhaust the entire stock, it remains true that there was to be no sales or purchase, either of the stock as an entirety or of any piece thereof, until a time in the future subsequent to the making of the agreement and delivery under it, when the privilege was actually exercised by the bankrupt under conditions authorized by the terms of the agreement. During the interim the title and ownership remained in the petitioner, the possession being in the bankrupt for the purpose only of use by him as samples. Until the privilege of purchase was in fact exercised by the bankrupt, the effect of the transaction was not a sale with retention of title to secure the purchase price, but a bailment for the purpose of use as samples and with the privilege of purchase when conditions justified. In such a contract title does not pass to the purchaser any more than in an ordinary bailment, and it is not void as to creditors. * * * If these citations correctly assert the law, the conditional privilege of purchase conferred on the bankrupt did not convert the contract, which concededly was otherwise one of bailment, into a contract of sale. There was no sale until the privilege was exercised by the bankrupt and then only as to the pieces purchased in each instance. Accordingly, the goods which came into the hands of the trustee, as to which no option to purchase had been exercised by the bankrupt before the filing of the petition, were held by him at that time as bailee merely, and are subject to be reclaimed by the petitioner."

Another case in which the 1910 amendment

is construed and applied to facts quite similar to those in this case, is *In re Reynolds*, 203 Fed. 162. The court says:

“This cause is before me on petition for review filed by the Birdsell Manufacturing Company, complaining of an order of the referee denying its petition, whereby it asserted ownership to certain property in the possession of the trustee. Its right thereto depends on the nature of its contract with the bankrupt under which the unsold property in the possession of the trustee and claimed by it was delivered to him. Was it a bailment for sale or a conditional sale? If a conditional sale, it was a mortgage, and, not having been recorded, the trustee takes precedence over it by virtue of the amendment of 1910, * * * and the petition was properly denied. It is only on the basis that it was a bailment for sale that the petitioner was entitled to any relief. I think that the contract was a bailment for sale under these authorities. *In re Galt* (C. C. A. 7th Cir.), 13 Am. Bankr. Rep. 575, 120 Fed. 64, 56 C. C. A. 470; *John Deere Plow Co. v. McDavid* (C. C. A. 8th Cir.), 14 Am. Bankr. Rep. 653, 137 Fed. 802, 70 C. C. A. 422; *In re Columbus Buggy Co.* (C. C. A. 8th Cir.), 16 Am. Bankr. Rep. 759, 143 Fed. 859, 74 C. C. A. 611; *In re Pierce* (C. C. A. 8th Cir.), 19 Am. Bankr. Rep. 664, 157 Fed. 757, 85 C. C. A. 14; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093.

“The fourth clause of the contract is mostly relied upon in support of the position that it was a conditional sale. By virtue thereof undoubtedly on the 1st day of each month all notes and accounts for wagons sold on time became the property of the bankrupt. The bankrupt at that time had to account for all goods sold during the preceding month, and for such as were sold on time he could settle to

the extent of \$100 by executing his four months' note without interest. But this did not have the effect of making a sale of such goods as had not been sold. In case of *Parlett v. Blake* (C. C. A. 8th Cir.), 26 Am. Bankr. Rep. 25, 188 Fed. 200, 110 C. C. A. 72, 39 L. R. A. (N. S.) 620, it was assumed that an agency contract, containing a provision that at the expiration of its term the agent should buy all goods not theretofore sold at the then current prices, was not a sale contract before the expiration of the term. It became such only upon the expiration of the term as to goods then unsold. So here this contract, otherwise an agency contract as to goods not sold, is not made a sale contract as to them because on the 1st day of each month it became a sale contract as to the proceeds of goods sold during the preceding month on time. I think, however, that the petitioner's right is limited to the unsold goods. He has none as to the proceeds of goods sold because of this fourth clause.

"The order of the referee is reversed, with directions to allow petitioner the unsold goods claimed by it."

II.

NO PREJUDICE TO BANKRUPTS' OTHER CREDITORS HAS BEEN SHOWN.

There is not one word of evidence in this case to show that bankrupts' other creditors will receive less than the amount of their claims on account of the withdrawal by appellant of the goods in question.

In *Hart v. Emmerson-Brantingham Co.*, 203 Fed. 60, the court, in part, says:

“In addition to the reasons already indicated, there is another reason why the plaintiff in this case cannot recover. To entitle him to a judgment, it is incumbent on the plaintiff to both plead and prove that the effect of the transfer complained of was to enable the defendant to obtain a greater percentage of its debt than any other creditor of the bankrupt of the same class. *Swarts v. Fourth National Bank*, 8 Am. Bankr. Rep. 673, 117 Fed. 1, 54 C. C. A. 387; *Painter v. Napoleon Township* (D. C.), 19 Am. Bankr. Rep. 412, 156 Fed. 289. The plaintiff has properly pleaded this essential element of a voidable preference, but no evidence has been submitted to sustain the allegation. The evidence fails to show what assets came into the hands of the trustee, and what creditors are entitled to participate in the distribution, and hence it is impossible to determine whether the return of the defendant's goods has resulted in giving it a greater percentage of its debt than has, or will be, paid to other creditors.

We also invite the court's attention to the fact that there is no evidence in this case tending to show any creditors without notice subsequent to March, 1912, when the goods in question were received by bankrupts in Seattle.

The local law of the State of Washington provides that all conditional sales of personal property, where the property is placed in the possession of the vendee, shall be absolute as to subsequent creditors in good faith, unless within ten days after taking

possession by the vendee a memorandum of such sale, stating its terms and conditions, signed by the vendor and vendee, shall be filed in the Auditor's office of the county wherein the vendee takes possession of the goods.

Remington & Ballinger's Code, Par. 3670.

Therefore, even under the theory that the delivery of these goods constituted a conditional sale, which, of course, we do not concede, still rights of the trustee would be limited to subsequent creditors without notice.

In re Rutland-Perry Co., 205 Fed. 200.

Wherefore, it is respectfully submitted that the judgment order of the district court should be reversed with costs to appellant.

FRANK E. GREEN,
Attorney for Appellant.

7

In the United States Circuit Court of Appeals for the Ninth Circuit

BERRY BROTHERS, a corporation,
Appellant,

vs.

R. B. SNOWDON, as Trustee in Bank-
ruptcy,

Appellee.

In the Matter of EDWIN L. GRAVES
and GEORGE E. LABELLE, co-
partners as GRAVES & LABELLE,
and FEDERAL PAINT & WALL
PAPER COMPANY, and EDWIN
L. GRAVES, individually, and
GEORGE E. LABELLE, individ-
ually, Bankrupts.

No. 2286.

APPEAL FROM THE DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASH-
INGTON, NORTHERN DIVISION.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

In March, 1912, appellant delivered to bank-
rupts merchandise of the value of approximately
five thousand (\$5,000.00) dollars, delivering to the

latter at the same time a detailed statement of the whole shipment (Trans. p. 6). At or before the time of the delivery the parties entered into a contract (Trans. pp. 8-9) with reference to the goods. The merchandise referred to was placed in bankrupt's warehouse together with their other stock (Trans. p. 6) and all the property in the warehouse, including that in controversy, was listed by the bankrupts as an asset in a financial statement made by them (Trans. p. 8). They had absolute control of the merchandise; could remove all or any part of it to their salesrooms at will, or could sell it at wholesale or retail. The agreement placed no limitations upon their control of it. In November, 1912, and within four months of the bankruptcy proceedings, appellants retook \$3,000 worth of said merchandise. Said retaking was done with the knowledge on the part of appellants of the insolvency of bankrupts and over the objections of one of the creditors.

ARGUMENT.

Appellant's first contention is that the goods while stored in bankrupt's warehouse constituted a bailment and were not subject to liens of the bankrupt's creditors.

It is apparent that the transaction in this case is either a sale, a mortgage, a bailment, a gift or an exchange. By process of elimination we will be able to arrive at the true character of the transaction.

If the agreement should be construed as a mortgage it would be void as against creditors for failure to record. No one will contend that a gift or exchange was intended. The question then is whether this is a bailment or a sale.

In the contract between the parties in this case the essential element of a bailment is entirely lacking.

“In a bailment, at most, only a special property passes to the bailee, who receives possession for a particular purpose, upon contract that after the purpose has been fulfilled it shall be redelivered to the bailor or otherwise dealt with according to his directions, while the general property remains in the bailor. The common test of bailment or sale is whether it is the intention of the parties that the thing delivered shall be returned.”

35 *Cyc.* 28.

“It is essential that the parties to the contract should have intended a return of the specific thing bailed, even if in an altered form, or its delivery to some third person, with the express or implied consent of the bailor. Where there is no intention that

the specific articles should be returned or delivered to another, the transaction becomes either a sale, a mortgage, a gift or an exchange.”

5 *Cyc.* 169.

1 *Loveland* 836.

“A bailment may be defined as a delivery of personalty for some particular purpose or on mere deposit upon a contract, express or implied, that after the purpose has been fulfilled it shall be re-delivered to the person who delivered it or otherwise dealt with according to his directions.”

5 *Cyc.* 161.

There is absolutely no provision in this contract for the return of the specific thing which appellant claims was delivered to the bankrupts as bailees. True, there is a provision therein that the contract may be terminated upon thirty days' notice, but upon the admissions of claimants, during that thirty days there would have been nothing whatever to prevent the bankrupts from removing the stock to their store, and upon such action on the part of the bankrupts there would have been no contract between the parties to terminate.

The case before the court is easily distinguishable from the Washington cases cited by appellant on page eight of its brief. In one of those cases the goods were sent merely for inspection, and in

the other case shingle bolts were delivered to the manufacturer for a specific purpose, to-wit: to be manufactured into shingles. The conclusion to be drawn from an arrangement of this kind is manifestly different from the one to be drawn from the conditions similar to those existing in this case. The goods in question were not delivered for any other purpose than to be sold in the ordinary course of business.

The cases cited by appellant in so far as they are applicable to bankruptcy proceedings were, except as noted, all decided prior to the amendment of 1910.

“Under the amendment of 1910, the trustee is vested with the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, although no such proceedings had actually been taken by a creditor. A title which would have been valid between the parties prior to the amendment is not necessarily valid as against the trustee in proceedings subsequent to the amendment.

“The reason is that the trustee is in the position of a creditor holding a legal or equitable lien for the purpose of attacking the claimant’s title. The character or validity of title is to be determined by local law.”

1 *Loveland* 832.

The case of *Southern Hardware Co. vs. Clark*, 201 Fed. 1, cited by appellant, was a case in which the validity of a conditional sale contract of an auto-

mobile was involved. There is no statute in Florida requiring the recording of such contracts and it was therefore held that the contract was valid without recording.

In the case of *L. C. Smith & Bros. Typewriter Co. vs. Allerman*, 199 Fed. 1, the bankrupt leased a typewriter under a rent contract for hire for a term of seven months and on account of local law the transaction was held valid in this case. However, Bradford, J., concurred because, "the decisions of the Supreme Court of Pennsylvania having established the rule of property in force in that State on the subject of conditional sales and bailments of personal property, the Federal courts are under obligation to enforce it here without regard to its soundness or unsoundness." In the case of *Wood Mining and Reaping Machine Co. vs. Vanstone*, 171 Fed. 375, the court followed the ruling laid down in the case of *Walter A. Wood vs. Eubanks*, 169 Fed. 931, which latter decision was based upon the fact that *under the bankruptcy act as it then stood* "the trustee in bankruptcy gets no better title than that which the bankrupt had." It is, therefore, easily seen that these cases are not applicable. Furthermore, a contract for the sale of a typewriter, an automobile or machinery of any kind

is essentially different from a contract with reference to goods, wares and merchandise which are allowed to be mingled with other goods, wares and merchandise and are delivered to a party in the ordinary course of business and appear to be his property. The natural presumption on the part of creditors is that a man who has a stock of goods in his store is the owner of them, unless the records show something to the contrary.

The case *In re Marx Tailoring Co.*, 28 A. B. R. 147, is an Alabama case and is not in point with the case herein to be decided. The court in deciding that case distinguished it from the case *In re Prie-gle Paint Co.*, 171 Fed. 586, which is also an Alabama case and similar to the case before the court. In the latter case the goods were delivered to the bankrupt for no other purpose than for a re-sale, while in the Marx case the primary purpose for delivery of possession of the goods to the bankrupt was to furnish *samples* by which to take orders for the making of suits by the petitioner in Louisville. There is a manifest difference between samples delivered for use, and merchandise delivered apparently for sale, and the two cases are not parallel.

As between the claimant and the bankrupts there, perhaps, may be no question about the val-

idity of the agreement, but the question to be here decided is whether or not that agreement is valid as against the trustee, who under the amendment of 1910 succeeds not only to the rights of the bankrupts but to the rights of creditors holding a lien by legal or equitable proceedings although no such proceedings had actually been taken.

Many subterfuges are attempted between wholesale houses and persons in financial difficulties, and “of such class of subterfuges are attempted warehousings of insolvent debtors of their own property on their own premises, pretending the transaction to be pledges and bailments, *but retaining control and substantial possession all the time.*”

“*While it may be true as stated by respondent that he was only required to pay for each lot as fast as he disposed of it * * * yet in making sales, he did so in his own name, and was held directly responsible, the securities obtained being taken to himself personally. * * ** His obligations to Childs & Co. were plainly regarded as a debt, and he so speaks of them in his testimony. There are too many indicia in this of an ordinary purchase to warrant the conclusion that anything else was in fact intended.”

Troy Wagon Works vs. Vastbinder, 12 A. B. R. 353, 130 Fed. 232.

“The goods were billed to the bankrupt as though it was a sale, and while this is not conclusive it is of more or less persuasive force.”

In re Wood, 15 A. B. R. 411, 140 Fed. 964.

According to the stipulation and Exhibit “A” the goods were billed to Graves & LaBelle, and the latter were only required to pay for each lot as fast as they were disposed of, thus being closely in point with *Re Troy Wagon Works vs. Vastbinder, supra*, (p. 1) and *Re Woods, supra*.

“An arrangement whereby goods are delivered to a bankrupt and he is obliged to pay the invoice price as stated with each delivery by the consignor, and the latter is not obliged in the event of the bankrupt being unable to sell the goods, to receive the same back, constitutes as against the creditors of the bankrupt a sale, although the parties to the arrangement may describe it as one of consignment.”

Ludvigh vs. Am. Woolen Co. et al., 23 A. B. R. 314.

We call particular attention to the case *In re Penny & Anderson*, 23 A. B. R. 115. This case was decided in the U. S. District Court for the Southern District of New York, in which district the decisions have been almost uniformly the same as the decisions of the courts of our circuit. In the case of Penny & Anderson the claimant delivered certain wines and liquors to the bankrupts, which were for consumption or sale in the ordinary course of business. A contract was taken called a “memoran-

dum of consignment,” but contained a reservation of title in the vendor until full payment of the purchase price, but was silent as to the disposition of the proceeds of the sale. The goods were stored in the basement of the bankrupt’s place of business and were used as required, and the court held that the transaction constituted a sale and that the title to such goods passed to the trustee. The court there said:

“The transaction in question did not create the relations of principal and factor, *for a factor cannot make a profit of his agency nor a valid purchase for himself* and receive a commission for his services.”

“If it were claimed to be a warehousing contract it would be void against creditors because there was no change of possession, control or otherwise, *nor any real separation from other goods belonging to the bankrupts*. If it were claimed to be a chattel mortgage it would be void for non-filing as against the trustee. And if it were claimed to be a conditional sale it would be void as against creditors.”

In that case the court cited *re Hassam*, 18 A. B. R. 745, 153 Fed. 932, in which Judge Martin of Vermont said:

“It has been repeatedly held that when personal property is delivered to a vendee for sale or to be dealt with *in any way inconsistent with the ownership of the seller*, or so as to destroy his lien or

right of property the transaction cannot be upheld as a conditional sale and is a fraud upon the creditors of the vendee.”

The tendency in our State is to prevent secret arrangements which are liable to mislead creditors, and we have strict laws requiring the filing of chattel mortgages within a certain length of time; the filing of conditional sale contracts; the registering and licensing of commission merchants; and requiring that any contract of sale where there is a condition to be performed before vesting of title in the vendee must be recorded in the place where the vendee resides, and that without such filing the transaction is voidable.

As in many cases which come up where dealings are had with persons of limited means and meager credit, the transaction here has the appearance on its face of seeking to have the advantage of a sale, and at the same time retaining the security of a bailment. If claimant had contemplated at the time the agreement was entered into the return of the goods it certainly would have put a provision into that effect in the contract, but we think it clear that the only object of this agreement was to protect it in case of failure on the part of the vendees. As stated in the Penny & Anderson case, the transac-

tion here did not create the relation of principal and factor, for the factor cannot make a profit of his agency nor a valid purchase for himself and receive a commission for his services. Neither can it be held to be a warehousing contract for there was no real separation from other goods belonging to the bankrupts. Neither can it be held valid as a chattel mortgage, nor a conditional sale on account of the failure of the claimant to file the same of record, and it cannot possibly be termed a bailment because it lacks the main element, to-wit: the agreement to return the goods at a specified time, nor is there any specific description of the property whatever.

The goods were placed within the entire control of the bankrupts; were mingled with their other stock in their warehouse; portions of the goods were taken to their salesrooms as necessity required. Their statement on October 31, 1912, showed that the goods were included in their inventory as a part of their assets, and the appellant allowed the bankrupts to exercise that control over the goods which is absolutely inconsistent with the ownership of the merchandise by appellant.

It is difficult to embody the testimony of a witness in a stipulation, but the referee, who has had

wide experience in bankruptcy cases, and who had occasion to hear the testimony of the only witness in this case and to pass upon the facts as they were presented to him at the hearing, found in favor of the trustee. He stated:

“The bankrupts had entire control of the merchandise with the absolute right to sell any part or the whole thereof at any time they might elect to do so, such sales to be made in their own name and at any price which they might see fit to charge and with no provision whatever that the particular funds derived from each sale should be claimed by the claimant. * * * This being so the referee is unable to find that the secret agreement between the claimant and the bankrupts requiring the claimant to pay storage charges could in any way affect the question of the change of title as to creditors. It follows that in the opinion of the referee the taking of the merchandise in question was prejudicial to the rights of creditors and constituted a preference which must be surrendered before the claim in question can be allowed.”

If agreements like this were allowed to stand and wholesale houses were permitted to enter into iron-clad contracts with a person in straightened circumstances, whereby they would be entitled to the return of any goods which they might ship such persons, unlimited fraud could be accomplished and no one would be safe in dealing with a retail merchant of limited resources. The tendency of the law is to

prevent such fraud and to enable all creditors to share alike in case of insolvency proceedings.

As to the second contention of counsel, to-wit: that no prejudice to bankrupts' other creditors has been shown, we call the court's attention to the fact that the goods in question were at all times mingled with the other stock of the bankrupts in their warehouse, and that they apparently exercised absolute control over the goods, and creditors had no notice, either actual or recorded, that the property in question was not the absolute property of the bankrupts. The burden of proof is not upon the trustee in a proceed of this kind to prove that the assets are insufficient to pay the creditors in full. This is not a separate suit as was the case of *Hart vs. Emmerson Brantingham Co.*, 203 Fed. 60, cited by appellant, for the proceeding here comes up in the administration of the bankrupts' estate upon objections filed by the trustee, and the court will, of course, take judicial notice of the fact that the records in that case show that the assets of the bankrupts are less than their liabilities. In fact the condition of the proceedings at the present time would tend to indicate that less than fifteen per cent will be paid to the unsecured creditors.

It cannot be seriously contended that the re-taking of these goods by the appellant, the value of which is over Three Thousand Dollars, did not enable appellant to secure a greater percentage of its claim than it would if it had not received such goods.

In conclusion we quote from the opinion of the District Judge:

“The order of the referee is confirmed. While the arrangement between the creditor and the bankrupt was not an ordinary sale, yet as to the creditors, if not an absolute sale, it was a conditional one, requiring recording as against creditors. The contract and stipulated facts show that as a bailment it was merely colorable.”

The judgment appealed from should be affirmed.

Respectfully submitted,

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